







THE *See Table & 145 parts  
Reports 32-14* *Just*  
REPORTS

OF

That Reverend and Learned

JUDGE,

THE RIGHT HONOURABLE

S<sup>r</sup> HENRY HOBART

Knight and Baronet, Lord Chiefe

Justice of his *MAJESTIES*

*Court of Common Pleas;*

And Chancellour to both their Highnesses,

HENRY and CHARLS

PRINCES of *Wales.*

Enlarged with the Addition of some Cases never Printed before, and purged from the numberlesse and incturable Errors of the former Impression.

*Emendare tuos, o Fidentine, Libellos*

*Multa non possunt, una Litura potest. Martial.*

---

L O N D O N

Printed by *James Fleisher*, for *William Lee* and *Daniel Pakeman*,  
and are to be sold at their shops in

*Fleet-street. 1650.*

# REPORTS

THE

OF

That Reverend and Learned

## JUDGE

THE RIGHT HONOURABLE

### S<sup>R</sup> HENRY HOBART

Knight and Baronet, Lord Chief

Justice of the King's Bench

of the County of Kent

And Chancellor of the Duchy of Lancaster

### HENRY LANCHESTER

Attorney at Law



Enlarged with the Addition of some Cases never Printed before  
and purged from the numberless and innumerable  
Errors of the former Impression.

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LONDON

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I Have perused this treatise, called the  
**L**ord Hobart Reports, and I conceive  
the printing of it will be for the  
good of the kingdome and the Com-  
mon law.

June 13. 1646. Car. 22.

Philip Fermyn.

# REPORTS

OF

## S. HENRY HOBART

Lord Chiefe Justice of  
the Common Pleas.

Richard Earle of Clanrickard, and the Lady Francis his wife, against  
Robert Sidney.

Suffex.  
Mich. 11. Jac.  
rot. 66.



Richard Earle of Clanrickard and the Lady Francis his  
wife brought a Forfeiture in Reverter against Ro-  
bert Sidney Viscount Lisle of others messuages,  
lands and tenements in Ewhurst, Warrington, and  
other Townes which Robert Earle of Essex and the  
said Francis then his wife by fine bin gave unto Wil-  
liam Gerard and Francis Mill, and the heires of the  
said William to the use of Elizabeth Sidney, daughter  
and heire of Sir Philip Sidney knight, and the heires  
of her body, and for default of such issue, to the use of the said Lady Francis,  
and her heires: Et quia post mortem pred. Eliz. ad prefatam Franc. revertere  
debent per firmam donationis pred. ac vigore stat. &c. et quod pred. Elizabetha  
non sit herid. de corpore suo excent.

Formedon in  
Reverter, to th  
Husband and  
wife by the  
wife.

Whereupon the said Earle and Countesse counted accordingly, and the Vis-  
count Lisle defendant pleaded in abatement of the writt, that the said Countesse  
at the time of the death of the said Elizabeth was covert of the plaintiff her now  
husband, so that the right of the said Tenements, si quid, &c. to her husband and  
heirs revert, and so by the said writt it ought to have bin suppressed; whereupon  
the defendants demurred in law; And it was adjudged for them, that the  
writt was insufficient.

Demurrer.

And in this case, these differences were observed; That if it were a Forfe-  
iture in descender, upon a descent to the wife, there the descent must be made in  
the writt to the wife alone, for the descent followeth the blood; and so that the  
husband is a stranger; and so is the books of 19 H. 6. 46. and 35 H. 6. fo. 10.  
where a Forfeiture in descender was brought by two husbands and their  
wives, and made the descent in blood to the wives only, and yet concluded, that  
the right ought to descend to the husbands and their wives; And exception taken  
to it, and ordered by the Court, that it should be amended, and the descent made  
only to the wives; On the other side in a *Cessavit* by the husband and the wife,  
in a writt of elefant, a *Consimili casu*, or action of waste, because there is vested in  
them already either a signioze or reversion actually, and therefore the land hold-  
ing, or the present estate to returne, is come into possession, therefore in those  
cases;

Differences.

19 H. 6. 46.  
35 H. 6. fol.  
10. 13.







“Hunt the lessee entered, whereupon they took the said lessee of Edward  
 “against John Rudge, and took their damages to him, but then returned  
 “upon the defendant plaintiff to him, that the plaintiff had recovery of  
 “a *Warrentia Chiro* against him upon the same, which was  
 “laid, and that it was yet to be recovered, and was recovered  
 “demanded in law, and judgment given for him and damages and costs of  
 “pounds 6 shillings 8 pence, whereupon Rudge brought a writ of Error, in the  
 “Exchequer Chamber, and the single question was, whether upon this writ  
 “of *Warrentia Chiro* appeared unto a *franchise*, an action of covenant to recover damages  
 “could be grounded. And it was argued by all the Judges in the Exchequer  
 “Chamber, that this action of covenant could be, because that though the *Warrentia*  
 “*Chiro* was entered in a *franchise*, yet the lessee and his heirs were not of a  
 “*franchise*, but of a *Chiro* (that is to say) of a lease for years, so that they  
 “could neither be a *tenant*, *tenant*, nor *Warrentia Chiro*, but that they  
 “had been a judgment in the *Warrentia Chiro* in this case, yet yetter making  
 “not upon recovery in *Exchequer* upon this writ, there could be no judgment,  
 “nor *Warrentia Chiro* laid upon the *Warrentia Chiro* in this case, and  
 “in a covenant writ, when the *franchise* is brought in question. And judgment  
 “is in question, as may often be seen that both writs in this case, the *franchise*, it might  
 “well be a *franchise*, covenant, whereupon damages may be recovered, and it  
 “be both a writ and personal covenant to recover, and so it shall be, and so it  
 “be brought for the judgment upon the writ of error. And so it was  
 “judged, that there was no error, and that the lessee was to be in the writ  
 “of *Exchequer*. It was affirmed that it appeared sufficiently that they were  
 “And that the declaration said that he did not know that the writ was in the  
 “writ, and that Hunt entered, and so of the other writs. And it was  
 “judged that there was no error. And if there were any error it is not enough  
 “that it be not certain what or how much, because there was no error in the  
 “but damages only. And the effecting of *Warrentia Chiro* is that there was  
 “some lands.

Error.  
Question.

Judgement in  
Error affirmed.  
2 Error.

### Mulgrave versus Wharton.

Edward Mulgrave had judgment against Thomas Wharton, *Stipul* of Edward  
 Mulgrave upon an obligation of the hundred pounds, and the action was laid  
 in the County of Cumberland. And judgment was given for the plaintiff upon the same  
 writ, and a *Scir. fac.* in Westmoreland was laid, and judgment was given for the plaintiff  
 And now upon a writ of error that judgment was reversed in the Exchequer  
 Chamber. For a *Scir. fac.* must be brought in the same County where the first  
 action was laid.

Error.  
Cher. Chamb.  
Westmer.  
Trin. 9 Jac. R.  
304. Sc. fac.  
must be where  
the first action  
was laid.

### Lane versus Mallory.

Robert Lane brought an Assumpsit against Henry Mallory, and showed  
 that William Mallory, father of the said Henry deceased, was indebted  
 to the plaintiff in five hundred pounds, and that his John Wainworth, and  
 his Thomas Mildmay were bound unto the said William Mallory by five several  
 bills of exchange in five hundred pounds. And that the said William Mallory  
 did deliver those bills unto the said plaintiff to the intent that he might be  
 satisfied of the said five hundred pounds due unto him by the said Mallory, by  
 force whereof he was possessor of the said rat. And the defendant Henry Mal-  
 lory pretending himself to be executor to William the father, in consideration  
 that the plaintiff of the special favour of the defendant, would deliver unto  
 him the said bills, he did promise to pay unto him fifty pounds at one day,  
 and fifty at another, and showed that he delivered the rat, and the defendant  
 paid him fifty pounds of the first fifty pounds, and the rest he hath not paid upon  
 this *non assumpsit*, it was found for the plaintiff. Damages were one hundred  
 eighty

Assumpsit  
Cher. Chamb.  
London.

Pl. 11 h. Ro.  
525. Consider-  
ation where  
one takes loss.





Case.

Miles versus Jacob.

B. le Roy Ex-  
chequer Cha.  
*Innuendo*  
Thou hast  
poysoned  
Smith.

Damages se-  
verall and  
costs intire.

Costs intire  
though part of  
the Action  
faile.

Trespasse.

Southampton.  
B. le Roy.  
& L. Ex. Ch.

Hillar. 8 Jac.  
Rot. 538.  
Vifne whether  
from the  
Town or Pa-  
rish.

Error.

Hillar. 9 Jac.  
Cornub. B. le  
Roy. Et Exch.  
Ch. Hil. 9 Jac.  
Rot. 691.  
Vifne whether  
from Towne  
or Parish.

Edward Miles brought an action of the case against Francis Jacob for these words, *Thou innuendo, &c. hast poysoned Smith quendam Sam. Smith aduanc defunct. innuendo.* And it shall cost me a hundred pounds but I will hang thee for it. And farther declared that the defendant of inuere malice at the next Assizes and Gaole delibery holden at Bury, procured him to be safely indicted that he had given poysoned drinke to Smith, to the intent to poysen him, whereof he dyed. Whereupon Miles was afterwards acquitted. Upon issue not gualty it was found for the plaintiffe, and damages severally for the words and indictment seven pound a peece, and fourteene pound costs entire, whereupon Miles had judgement to recover the said damages and costs. And upon a writ of error, in the Exchequer Chamber, it was adjudged that the words could beare no action for others reasons. For if both not appeare by the words that he poysened him willingly, neither that Smith was dead at the time of the words spoken, and the *Innuendo* for that purpose is no sufficient averrement, but for the Indictment it is adjudged that the Action will lye, so that for the damages, for the words being severall the judgement being reversed for that part failed. But the judgement for the indictment together with the damages was affirmed also for all the costs, because there was just cause of suit which warranted the costs though part of the suit was without cause.

Brock versus Spencer.

William Brock brought an action of tresp. against John Spencer by cut-  
ting downe of certaine Oakes, carrying away of timber and by cut-  
ting Hurley. And in the new assignement lapes it in a Close called Newlands in  
Hurley aforesaid. To this the defendant pleadeth that Newlands was custom-  
ry lands of the Manor of Marden in the Parish of Hurley aforesaid. And that  
there is a custome within the said Manor of Marden that the Copphold te-  
nants of the same tenements might sell timber, &c. And the Plaintiffe traver-  
sed the custome, and it was found for him damages and costs eleven pounds  
in the Kings Bench. Then dyed Brock the plaintiffe, and Spencer brought a  
writ of error against Sir Thomas Savage, and others his executors, and one  
error assigned was, that the *Venire fac.* for trial of the custome was *de vicini-  
to de Hurley*, and not *de vicineto parochie de Hurley*. But all the Judges in  
the Exchequer Chamber overruled it to be good enough, for since it was first  
said that the trespass was done at Hurley which shall be understood a Towne,  
and then the defendant speaks of the Parish of Hurley aforesaid, they shall be  
understood all one, and two former judgements were cited according to the  
word aforesaid couples them.

Walsh versus Wray.

And the very like was adjudged at the same time in the Exchequer Ch.  
betweene Alice Walsh plaintiffe and William Wray Baronet defendant;  
in a writ of error, in an action for grinding of coyne at other spils contrary  
to the custome, and the difference was, that in the pleas there was mention  
of Liskarred, and the Parish of Liskarred aforesaid, and the *Venire fac.* was *de  
vicineto* of Liskarred, and judged good enough for the reason aforesaid.

Nota; that both the townes and parish are upon record, I hold that it would  
be a fault to take the vifne from the other, for it hath no warrant from the Re-  
cord.

Spend.

## Spendlowes versus Burket.

John Spendlowes brought an action of Trespasse against Richard Burket for breaking of his Close and taking away twenty four Lambes and certain cartloads of Hay, Rye, Barley, Oates, Pease, and Wheat, and certaine Acres of Wood. In pleading upon Demurrer the case was thus: Robert Cresley being Prebend of the Prebendary of Palderton and Farrington in the Church of the blessed Virgin Mary of Lincolne, was seised of the Rectory of Palderton with the appurtenances in his demesne as of fee in the right of his said Prebendary, and so seised the twenty day of February, 13 Eliz. did demise the same Rectory by Indenture unto Sir Jarvase Clifton Knight, and George Clifton Esquire for twenty yeares, then Thomas Bishop of Lincolne who was Patron of the said Prebend and Ordinary in the same Diocesse made the next abeydance of the said Prebend unto one Humphrey Toy, 5 April Anno 1571, which grant was confirmed by John Whiggin Deane and Chapter of the said Cathedral Church of the blessed Virgin Mary of Lincolne, the third day of August 1572. After which the same Thomas Bishop of Lincolne, 20 die Julii An. Reg. Eliz. 16. did confirm the lease made by Cresley unto Sir Jarvase and George Clifton, and the Deane and Chapter did likewise confirm it the 18 day of September in the same 16 yeares: the same Robert Cresley being still Prebend and alive. Then dyed Cresley the Prebendary in the 24 yeares of the Queene, and the next abeydance being brought down unto one Thomas Fisher and Ralph Bowyer Esq. they presented unto the same Prebendary John Prat Clerk, who was admitted, instituted, installed and inducted into the same. And after that the same Prat entered into the same Rectory, and was therof seised in his demesne as of fee in the right of the said Prebendary. Then dyed Thomas Bishop of Lincolne, and William Charleton succeeded him, then dyed Prat the Prebendary 7 Sep. 1607. After whose death Chaterton the Bishop did collate the same Prebendary unto one Thomas Burton Clerk whom he caused to be instituted and inducted into the said Prebendary, who entered into the said Parsonage and leased the same 4 Janu. 34. Regis Jac. 2. unto one Anthony Ward for 20 yeares, from the feast of Saint Martin then past. And then this lease was conveyed unto Spendlow, who entered upon whom Burket as servant unto Henry Carvill who claimed under the lease made by Cresley unto the Cliftons: entered upon a close being given, and took the Lambes and corns being Lxxviii of the Parsonage of Palderton aforesaid whereupon Spendlow brought his action of trespass.

And now it was adjudged Pasch. 12. of the King, that the plaintiffe should recover, for though the lease made by Cresley for twenty yeares, was not yet expired in time, and though Burton the Prebendary came in after and under the confirmation of the lease, yet Prat the Prebendary before him came in by the grant of a next abeydance by a grant made, confirmed and perfected before the confirmation of the lease, and so consequently was not subject unto it, and then when he came upon the parsonage, he was seised in his demesne as of fee, and so did demise the lease totally, so as it could never revive or take place against any successor whatsoever, upon which reason there is a large discourse in the Case of last case, Co. l. 7. fo. 8. And though Littleton seems to be of opinion that the patron hath not the right of fee simple, he doth expound himselfe as to the bringing of the writ of right, but otherwise the act of the Patron is it which charges or gives. And it sufficeth that the Patron or Ordinary do either license or assent. And therefore 6 E. 6. Dyer. 69. If a Parson make a lease or charge his glebe to begin after his death, and the Patron and Ordinary confirme it in his life, this shall binde his successors:

Trespasse.

Not:  
Tr. 11 Jac.  
Rot. 3461.Lease by a  
Prebendary is  
totally defeated  
by his  
Successor.

P. 12 Jac.

Co. lib. 7. fo. 8.

Baker



Debt.

Baker versus Spaine.

Kanc. Com.  
Pleas Hil. 11.  
Iac. Rot. 3139.Rent pleaded  
behind upon  
Bond, it needs  
not to allege  
demand ex-  
pressly.It is otherwise  
in justifying of  
Entries for non  
payment of  
rent.Judgement.  
Bond to pay  
rent it must be  
rendered but  
upon the land  
as rent.Partition.  
Incerti nomi-  
nis.Effoines in  
writs of parti-  
tion severall.

West. 1. ca. 43.

Effoines se-  
verall for vou-  
chees.  
38 E. 3. 18.

Case.

Mid.  
Mich. 11 Iac.  
Rot. 1252. in  
Com. Banco.

William Baker brought an action of debt upon an obligation of fifty pound against Simon Spaine. The condition was, that this defendant should observe, performe, fulfill, pay, and keepe all and singular the covenants, grants, payments, and conditions expressed and contained in one paire of Indentures bearing date, &c. The defendant pleads the Indenture, being an Indenture of lease, and pleads generally the performance of all covenants, &c. The plaintife assigns the breach for non-payment of a halfe pears rent being thirteene pound ten shillings at our Lady day 9 Jac. the defendant rejoynes that the plaintife entred into the lands demised before the said fest sc. 24. die Martii Anno Regis 9. Whereupon issue was taken, and it was said in arrest of judgement for the plaintife that there was no breach laid, because there was no demand of the rent alleged. And the rest of the Judges said that it was no fault, because the issue did not arise upon the rent not paid, but upon a Collaterall point that did admit the rent not paid, because by the entry it was made not payable. But I held that in this place the breach was plainly made in the replication when the plaintife said that the rent was behinde, which implies that it was demanded and not paid, for in such case the plaintife never pleads that he did demand it, and it was behinde. But if it were not indeed demanded then after the plaintife hath pleaded the rent behinde, which is true *prima facie*, then the defendant rejoynes that he was there ready to pay it, and no man did demand it, and so the demand comes in issue, and so Judgement was given for the plaintife. And in this case Justice Warberton said, that it was resolved in a former case in this Court, that where a rent was reserved upon a lease, the lessee bound by obligation to pay it, that now the lessee must pay it without demand, but he is not bound to seeke the lessor, but to tender it only upon the land, for he hath bound himselfe to pay it, but still as a rent, and where the law will.

## Case of Effoines.

A writ of partition was brought against three, whereof one was effoined, and the other two likewise would cast feveral Effoines, the demandants Counsell said that they could not have feveral Effoines, because that the Stat. of Westm. 1. cap. 43. hath provided, that many Tenants should have but one Effoine, as if they were but one Tenant: whereupon I looked upon the Statute in court, and said that I was of opinion, that that Statute was not to be understood of a writ of partition where nothing is in question but the division of the land, but where the right of the land was in question. And that the words of the Statute did import so much, which provides against the delay of right by feveral Effoines. And the Prothonotaries being asked, said that their precedents were so, that they might sever in Effoines in a writ of partition, and that after appearance: and after Trinity term 12 Jac. motion was made, that two being vouched in the Formedon in Reverter, brought by the Earle of Clanricard and his Lady, against the Lord Lisle before an appearance, one of the vouches cast an effoine, and it was excepted unto upon the said Statute. But it was resolved, that the Stat. was to be expounded of Effoines cast by jointenants after appearance, for till then it could not appear whether they were Tenants or no, which are the words of the Statute, and the Statute of Glouc. csp. 10. recites that the Statute is expressly of Effoines after appearance.

## Yardley versus Ellill.

Yardley an Attorney of the Common Pleas, brought an action of the Case against Ellill and said that whereas he had bene, and yet was an attorney, the defendant had speech concerning him with one Bancroft, with whom he was

was before retained for his attorney, and said unto the said Bancroft, Pont  
attorney (meaning the said Yardley) is a bribing knave, and hath taken  
twenty pounds of you (meaning the said Bancroft) to cozen me (meaning the  
said Hill) upon this not guilty. It was found for the plaintiff, and now it  
was spoken in arrest of Judgement, two or three several times by several  
Hearers. It was said that these words were spoken adversely, that the words  
[bribing] might be understood doubtfully, either by giving or taking Bribes. A  
point, that the second clause should be taken as a declaration of the former ge-  
nerall, and therefore if they alone would not bear Action, they would extenuate  
the former words, like to the common Cases. Thou art a theefe, for thou hast  
taken my Apples out of my Orchard, and thou hast taken it, as it is here;  
and so to all one. And there it was said, that an attorney could not take a  
Bribe, so he is no Judge, at least he could not take a bribe of his own client.  
And that opinion was Justice Warberton; And Justice Winch said, that  
the last words were not sufficient of themselves heretofore. It was not said that  
the words were taken for any cause depending, but Justice Nicholls and I were  
of opinion, that the Action would lie, and that the generall words [bribing  
knave] were sufficient of themselves, for the word [bribing] is a word of cer-  
tain signification, and both import a common practice in him, whether he may  
take or be given to. And whether he give or take a bribe, they are both un-  
lawfull against his Oath, for he oweth to his client fidelity, secrecy, diligence,  
and skill; but he oweth him not any dishonest or undue practice; for by this  
generall obligation to Justice and the Court where he serveth, he is forbidden  
to do any thing to pervert Justice, as appeareth by his oath; and Justice  
Warberton said, that these generall words alone, would have borne an action;  
and Justice Winch seemed not to deny it. Then to the speciall, we two were  
of opinion, that they did aggravate, and make them good in particular.  
And I said that an attorney may be said to receive a bribe, for whosoever hath  
any intermeddling in case of Justice, he be either Judge, Officer or Attorney,  
he receiveth an undue reward for any thing against Justice, that is a bribe,  
whosoever attorney may receive a bribe of his own client, when the reward  
is undue, and the end of the cause of reward is against Justice, as if he  
will take a reward to raise a record, or cause an attorney to appear on the other  
side, and confesse the action or the like; both which points are fall in this case,  
for he receiveth twenty pounds for a bribe to cozen the defendant; and I insisted  
upon Burchleys case, where the words were that Burchley being an at-  
torney was a corrupt man, and dealt corruptly; which words are so generall,  
as they not pitch upon any certaine kind of corruption as these doe. Onely  
he was intreated in the declaration, that there was former speech of Burchleys  
being an attorney; And Justice Warberton after I had spoken said that  
it began to stagger in his opinion. And after, Tr. 13 Jac. Judgement was  
given for the plaintiffe.

Action sur le  
case an attor-  
ney a bribing  
knave.

Burchleys case.  
Judgement.

Debr.  
Quer. ter.

Executor can-  
not claime  
money appoi-  
nted to an ad-  
all Assignee.

Debr.  
Quer. ter.

done

Pease and Stileman executors of Elizabeth Hanchet  
against Mead.

Pease and Stileman executors unto Elizabeth Hanchet, brought an action  
of debt against Meade, upon an obligation of thirty pound, the compo-  
nion was, that Meade should pay twenty pound to such person or persons as  
the said Elizabeth Hanchet should by her last will and testament, in writing  
name and appoint the same to be paid. The defendant saith, that she did  
appoint no person to whom the same should be paid, the plaintiffes replied,  
that she made her will in writing, and thereby made them her executors, where-  
upon the defendant demurred in law, and the opinion of the court was cleare,  
that the money is not payable unto the executors; for though, where any thing  
testamentary is commanded to be done unto a man or his Assignes, that is to be

C

done to the executor, where there is no actual Assignee as in Chapman and Daltons case, and in 27 H. 8. For the delivering of Rentals to a man and his Assignee, the reason is, because the word [assignee] is indifferent both to the assignee in deed and in law. And there when the executor takes it, he hath it to the use of the testator. But here the word must needs be understood of an assignee indeed, who shall take it to his own use for the word [paying] carrieth property with it.

### Fryer versus Gildridge.

Debt.

Hil. 11 Jac.  
Rot. 190.  
Brownlow.  
One person is  
executor both  
to Obligor &  
Obligee.

Judgement.

Fryer brought an action of debt against Gildridge upon an obligation, and the case fell out to be thus. Two were bound to a third jointly and severally. The obligee made the wife of one of the obligors his executrix, and dyed. The woman executrix administered, then the husband the obligor made her his executrix and dyed, leaving assets to pay the debt, then she dyed and the plaintiff took administration of the goods and chattels of the obligee unadministered, and brought his action against the defendant being the surviving obligor, & it was adjudged by all the Court, that the action would not lye, upon two reasons. The first that when the obligee made the wife of one of the obligors his executrix, the action was at least suspended, and then the rule is, that a personall action once suspended is extinct. But the other reason is the surer, when the obligor made the executrix of the obligee his executrix and left assets; the debt was presently satisfied by way of release, and consequently no new action can be had for that debt.

### Grifley versus Lothar.

Assumpsit.  
Hil. 11 Jac.  
Rot. 1866.  
Assumpsit in  
consideration  
the mother  
should consent  
to the marriage  
of her daughter.

Note the husband being  
Father (who  
hath all power  
over the Child  
and not the  
mother legally)  
was alive the  
time of the  
promise, but  
yet her power  
is also great in  
nature.

Judgements

Libel. Eccl.

Disms of the  
rent of houses  
by prescription.

Grifley brought an Assumpsit against Lothar and declared, that where she had a daughter which was heire apparent to her husband the defendant's testator, in consideration that she at his speciall instance and request would give her consent, that he should have that daughter to wife, that he would give her one hundred pounds, and then together that she should give her consent &c. And the defendant pleaded non assumpsit, it was found against him. And now it was spoken in arrest of Judgement, that this was no consideration at all, that there was nothing to be done of the part of the plaintiff actually, that was to be done unto her, either for travail or charge, but to give a naked consent, which was not in law necessary to the marriage. Neither is the daughter said to be heire apparent to the mother, nor in her power or guard by nurture, or otherwise; neither doth it appear that she was any advancement to the defendant, for a woman is acknowledged in law to be advanced in marriage alone, but so is not the man, and therefore she hath the right in *Causa Matrimonii prelocuti*, but so hath not the man. And of this opinion was Justice Winch. But my selfe and other two Judges were of the contrary opinion, for it is apparent that the mother hath by the law of nature and in the affection of the daughter, and the confidence arising thereof in her command and direction, a speciall stroke to incline the daughters minde either one way or other, and the desire of her consent, and the working of it, shewes that to the plaintiffe conceived it, and therefore it shall be presumed of importance to have her consent, which being granted at his suit and request, shall be accounted consideration sufficient. And so it was adjudged for the plaintiffe, Trinit. Jac.

### DoEtor Leifield versus Tyfdale.

DoEtor Leifield Parson of S. Clements without Temple barre, sued one Tyfdale his parishoner for tithes of certaine stables, and libelled that of common right, and by prescription time out of minde the Parsons there used to have a *minus decimandi* for the houses, stables, and buildings, that is



to say, after the rate of the tenth part of the yearly rent or value of the same. And so he proceeds to demand accordingly, whereupon a prohibition was desired, and the opinion of the Court was, that a prohibition was to be granted; for *de communi jure*, no tithes are to be paid for the yearly rent or value of houses, for tithes are paid for the revenue and increase of things: And therefore no tithes are paid in any such case in any Cities or towns in England, saving in London, and this Parish is out of London and the liberties thereof. Now where there is no tithes at all *de communi jure*, there can never be a *modus decimandi*, for that is with an abatement, correction, or alteration of the tithe in specie. And yet it seems that this kind of payment had been long used here about London, which certainly was by use; for when the statute gave it in London, the parts adjoining gained the same by that colour, and even in London it must be used for according to the forme prescribed by the statute. But for houses valuations were paid in all places, and now by the statute were brought to a certainty, that is, a groat for a house.

And in this case Justice Warborton said, that it had been lately adjudged in this Court, that a copyholder could not lay a custome to sell and sell timber upon his copyhold.

And in Mich. 12 Jac. the case was moved againe by Harris for the Widow who said that by a speciall custome such a forme of tithing would stand in any place, and said that Doctor Grant had a consultation in this Court upon Argument in the very same case for two shillings in the pound in St. Martins le Grand which was not within the statute, for it is a liberty exempted from London and is no part of London nor of the liberties of London: and the reason was because it may be supposed that such forme of tithing was used for the land as late before it was built upon, and then the building cannot take it away: And therefore it is now directed by the Court that they shall declare upon the prohibition, and then proceed to judgement.

Nota, That Modus decimandi can hardly stand to rise and fall according to the rent by prescription.

Bridgemans Case.

Admiralty cannot hold plea for things at land.

Philip Bridgeman sued one Williams in the Admiralty Court, and the case was this; that one Philip Bernard was owner of a ship called the Bonaventure, and sent her into Spaine, and made Williams master of her, who (as is alleged in the Admiralty Court) did upon the high Sea borrow of Bridgeman certain Ropalls of Eight, to the value of fifty pounds sterling, for repayment whereof he did impaine the said ship, and returning now home, and the ship lying in the Thames, Bridgeman obtained a warrant from the Admiralty Court, to arrest the same ship, and did so, whereupon Bernard came into the Admiralty Court and claimed his property, denying that the said Williams was owner or had any power to paine it, yet notwithstanding the Court proceeded to judgement against the ship for his debt, whereupon a prohibition was granted by the Court, whereof the reasons were, that by the common law by which properties were to be tried, the master of the ship could not impaine the ship, for no property generall or speciall nor such power is given unto him by the constituting of him master. Also it was alleged that the contract (if any were) was made in Seville upon the land; and it was held that the Admiralty Court could hold no plea of things though done upon foreign lands; and it was also said that it had been often resolved, that if any obligation were made at Sea, yet it could not be sued in the Admiralty Court, because it is an obligation which takes his course, and binds according to the common law. But it was said by the counsell of Bridgeman, that by the civil law the master of the ship hath power to impaine the ship and tackle in case of necessity, and he hath no other meanes to provide such things as are necessary for her. And Hobard gave opinion generally upon the whole case thus; that the Admiralty Court hath no power over any cause at land, for both by the nature of the court and by the statute it is onely to meddle with things arising upon the high seas. And

Hobard.

further that these things at the sea done, must be also of the same nature and respect. And therefore if a man should make an Obligation at sea for security of a debt growing before at land, or should make a promise to pay the same, this cannot be sued in the Admiralty Court, because it is not for a marine cause; as a court of Wipeowder for market causes. But I was of opinion cleerly, that the Admirall law is reasonable that if a ship be at sea and take leake, or otherwise want victuall, or other necessities, whereby either her selfe be in danger or the voyage defeated, that in such case of necessity the Master may impatone for money or other things to relieve such extremities by employing the money so: for he is the person trusted with the ship and voyage, and therefore reasonably may be thought to have that power given to him impliedly, rather then to see the whole lost. But in this case the faults were that neither the contract nor the impatoning were said to be for any such cause, neither was the impatoning laid to be at sea, neither was there any colour that for the generall debt of the Master they should proceed against the ship of another man. And I am of opinion cleerly, that if this cause had been within the jurisdiction of the Admiralty, that we should not prohibit them, because they gave sentence against our law in this point of impatoning, for it shall be presumed according to their law, or else an appeale.

## Covenant.

Pasc. 11 Jac.  
Rot. 1358.  
Parol. Demise.

Covenant broken before  
eviction.

## Holder versus Taylor.

**H**older brought an action of covenant against Taylor, and declared for a lease for years made by the defendant by the word [Demise] which imports a covenant, and then shewes that at the time of the lease made, the lessee was not seised of the land but a stranger, and so the covenant in law broken. But he did not lay any actuall entry by force of his lease, nor any ejectment of the stranger, nor any clayming under him, whereupon it was objected, that no action of covenant would lye, because there was no expulsion. But the whole Court was of opinion that an action did lye; for the breach of covenant was, in that the lessee had taken upon him to demise that which he could not; for the word [demise] imports a power of letting as [dedi] a power of giving. And it is not reasonable to inforce the lessee to enter upon the land, and so to commit a trespass. But if it were an expresse covenant for quiet enjoying, there perhaps it were otherwise.

Obligation.  
Trin. 12 Jac.

Southamp.  
Pasc. 11 Jac.  
Rot. 346.

Bond by under-  
sheriffe to  
the high Sher-  
riffe.

## Sir Daniel Norton against Simmes.

**S**ir Daniel Norton Knight, late Sheriffe of Hampshire, brought an action upon an obligation of an hundred pounds against Richard Simmes for performance of covenants, whereof the effect was. That whereas Sir Daniel Norton had made Bryan Chamberlaine his under-Sheriffe at his will, the same Chamberlaine by indenture did covenant with the Sheriffe to discharge and save him harmlesse of all escapes of prisoners that should be arrested by him or any Waplitte or officers appointed by him. And another covenant was, that he would not execute any Extort, Liberate, Elegit, or any other execution for any summe above the summe of twenty pounds, before he had first made knowne to the said Sheriffe the nature and quality of the said writ, and if any such execution were above twenty pounds, then he should not execute it without the speciall warrant of the said Sir Daniel Norton the high Sheriffe. And there were also divers other covenants, and the defendant pleaded that Chamberlaine the under-Sheriffe had performed all the covenants, whereupon the plaintiffe replied, that one White Anno 44 Eliz. had recovered in the Common Pleas 203 pounds debt against one Feilder, and that he had gotten 52 pounds thereof by an execution of Fieri facias in the said County of Southhampton and dyeb, and that Frances White his executrix had sued a Scir. Fac. against the said Feilder for the residue scil. 151 pounds, and had judgement,

judgement, and tooke out a *Capias ad ſatisfaciendum* and delibered it to the ſaid Chamberlaine who arreſted him by force thereof, and ſo he was in execution in the cuſtody of the ſaid Sheriffe for the ſaid debt, and ſo being, and Chamberlaine remaining under Sheriffe, the ſaid Feilder eſcaped out of the cuſtody of the ſaid Sheriffe, the debt not ſatisfied. By meanes whereof, the ſaid Sheriffe was chargeable to pay the ſaid debt, and did pay it unto the ſaid Frances White. And all this was in the Sheriffewick of the ſaid Sir Daniel Norton, and while the ſaid Chamberlaine was under Sheriffe; viz. 6 Jac. Reg. Whereupon the defendant demurred in law and in Trin. Term 13 Jac. the whole Court upon publick argument gave judgement for the plaintiff, and in this caſe theſe points were reſolved:

First, that this caſe was not within the ſtat. of 23 H. 6. both becauſe it was not a bond made by or in the behalfe of a priſoner as Beaufage his caſe is; as alſo becauſe the ſtatute is not pleaded, being a ſpeciall law. And alſo becauſe it was not directly pleaded that Norton was high Sheriffe, or Chamberlaine under Sheriffe, but only by way of recitall in the Indenture which was pleaded.

It was alſo reſolved that the Sheriffe might grant his under-Sheriffewick to hold at his will only; for it was in his choice to make or not to make an under-Sheriffe, but to exerciſe it himſelfe. That an under-Sheriffe is in effect but the Sheriffes Deputie, and therefore according to the nature of a deputa- tion muſt be removeable as an attornee is; ſo as if the Sheriffe ſhould make him irrevocable, yet he may revoke him. There is neither common law nor ſtatute law that makes him immoveable. He is but in the nature of a generall Bailie errant to the Sheriffe and the whole Shire, as others are over the hundred. His oath appointed by the ſtatute of 27 Eliz. is, that he ſhall beare him- ſelfe well for ſo long as he ſhall continue in the office. It is neceſſary both for the publick ſervice and for the indemnity of the Sheriffe that he be removeable by the Sheriffe.

Yet it is true that under-Sheriffes have been long in uſe, and experience proves that many Sheriffes cannot well execute it themſelves, ſo this point was reſolved, that he was a perfect under-Sheriffe, and ſo the arreſt well made by him, and ſo an eſcape upon it.

Next it was reſolved that a Sheriffe in making an under-Sheriffe did impli- cily give him power to execute all the ordinary Offices of the Sheriffe him- ſelfe, that might be transferred by the law. As ſerving of proceſs, and execu- tions, and the like. But he could not deale in a writ of *Rediſſeiſin*, becauſe in that the Sheriffe is a Judge; nor in that caſe of the writ of waſte, where the Sheriffe is commanded to goe to the place waſted, becauſe it is perſonall unto the Sheriffe himſelfe; hence it followes, that if a Sheriffe will make an under- Sheriffe, provided that he ſhall not ſerve executions above twenty pound, with- out his ſpeciall warrant, this proviſo will be void. For though he may chuſe not to make an under-Sheriffe at all, or may make him at his will and ſo remote him wholly, yet he cannot leave him an under-Sheriffe, and yet abridge his power no more then the King may, in caſe of the Sheriffe himſelfe. But it was ſaid here, that the caſe here was not ſo, That the reſtraint of executions, above twenty pound, grew not on the part of the Sheriffe, but on the part of the under- Sheriffe by his covenant, which might ſtand for good, notwithstanding the repugnance to his Office; As a Feoffee in fee ſimple, may bind himſelfe to the feoffor, not to alien, though the feoffor cannot reſtrain him himſelfe by con- dition, ſo the repugnance. But the covenant here was holden void as being againſt law and Juſtice. For ſince by being made under-Sheriffe, he is lyable by law to execute all proceſs, he could no more then the Sheriffe himſelfe, cove- nant not to execute proceſs without anothers ſpeciall warrant; for that is to deny or delay Juſtice: ſo this being a covenant againſt law, and being in the negative, needed no answer at all as being void and no covenant in law. And though it were not hold, yet the generall Plea of perſormance of all covenants will ſerve in the caſe of a negative covenant, *Tamen quare de eo*.

Under-Sheriffes  
power not to  
be reſtrained,

Covenants ne-  
gative void in  
law.

But



This Covenant  
is in effect not  
to ſuffer eſcapes.

But it was reſolved though this covenant were void in law, yet the Bond was good for the reſt of the covenants agreeable to law. And difference was taken between a bond made voyd by ſtatute and by Common law; for upon the ſtatute of 23 H. 6. if a Sheriffe will take a bond for a point againſt that law, and alſo for a due debt, the whole bond is void, for the letter of the ſtatute is ſo, for a ſtatute is a ſtrict law, but the common law doth divide according to common reaſon, and having made that void that is againſt law, lets the reſt ſtand as is 14 H. 8. fo. 15.

Bonds to ſave  
harmleſſe of  
eſcapes diffi-  
cult.

Hereof it ſolloweth that if the Covenant for diſcharge of eſcapes (*ut ſupra*) were good in law and broken, that then the plaintife ought to have Judgement, and it was agreed, that if a man will take a bond to be ſaved harmleſſe of ſuffering one to have eſcaped, or for enlarging of him out of priſon againſt the law, that theſe bonds are void. And ſo are the caſes of Dive and Manning in Pl. and the caſe of Thower and Whetſtone Mich. 2 & 3 Ph. & Mar. Dyer 118. and ſo is the caſe of 2 H. 4. fo. 9. for the Withernam.

Not requiſite  
to give notice  
where one is  
bound to doe  
an Act by  
bond.

But this caſe is cleane otherwiſe and was reſolved by the whole court, to be lawfull for the Sheriffe to take bond of his under-Sheriffe, to diſcharge and ſave him harmleſſe of eſcapes upon arreſts made by himſelfe; for ſince he tranſfers his authoritie unto him, it is reaſon he take ſecurity of him to perſonne all juſtly and faithfully to himſelfe and others, and there is nothing done or intended againſt law, for there is no lawfull permiſſion of any to eſcape already done or to be done. As in the other caſe where the fault is committed by the party that takes the bond upon confidence of that ſecurity. But here the beſt perſormance of the covenant is, that no eſcape be ſuffered. And the next, that if any be ſuffered, that then he ſatiffie the party as is juſt, that the Sheriffe take no loſſe. It was alſo reſolved, that the Sheriffe in this caſe was not bound, either to give notice to the under-Sheriffe of the eſcape, or to make requieſt for diſcharge, for the covenant hath no ſuch thing, but binds him to diſcharge at his perill. And I was of opinion, that if the covenant had not been againſt law for the executions above twenty pound, and that the barre had been inſufficient, becauſe it did not plead ſpecially to that negative covenant, that yet if the replication were naught and aſſigned no ſufficient breach, the plaintife could not have had Judgement; for though the action were well brought upon the obligation alone, yet when it appeareth that the condition was for perſormance of covenants, now there can be no cauſe of action without ſome covenant broken. And obſerve well Tilly and Woodlyes Caſe 7 E. 4. for this purpoſe, that if it doth appeare to the Court, that the plaintife hath no cauſe of action, he ſhall never have Judgement, though he had a verdict for him againſt one of the defendants.

Parliament.

### A Caſe of Burgeſſes of Parliament.

Burgesſes of  
Parliament &  
forme of ele-  
cting of them.

“ Many Townes in Ireland were erected into new Boroughes, and power  
“ given them to elect and ſend Burgeſſes into the Parliament, all in  
“ one forme, whereof for example, For the Towne of Dungannon the Patent  
“ runs thus, *Statuimus, ordinamus & declaramus per preſentes*, that the Towne  
“ of Dungannon ſhall be for ever a free Borough, and that within the ſaid  
“ Borough, there ſhall be a body Corporate and Politicke conſiſting of one  
“ Provoſt, Twelve Free Burgeſſes and Commonalty, and that the Inhabitants  
“ ſhall be a body Corporate by the name of Provoſt, Free Burgeſſes and Com-  
“ munity of the Borough of Dungannon, and may by that name ſue and be  
“ ſued, purchaſe and alien &c. And then ſolloweth this claule. *Et quod ipſi*  
“ *prefati Prepoſiti & liberi Burgeſes Burgi predicti & ſucceſſores ſui imperpetuum*  
“ *habeant plenam poteſtatem & Authoritatem Eligendi mittendi & returnandi*  
“ *duos diſcretos & idoneos viros ad inferiendum & Attendendum in quolibet Par-*  
“ *liamento in dicto regno noſtro Hibernia impoſter. tenend.* And ſo proceeds to  
“ give him power to treat and give voyce in Parliament, as other Burgeſſes  
“ of

of any other ancient Borough, either in Ireland or England, have used to do, and upon doubt conceived, whether that some had sufficiently enabled the rest of the new Boroughs to send Burgesses, it was referred to all the Judges, and it was resolved by them all but two, that it was sufficient. The objection was, that the Corporation being protestant Burgesses and a community, this liberty or privilege was neither granted to them nor passed by the word of grant though indefinite, not saying to whom, for then the grant must settle in the body capable of a grant by application of law, though it should not be said directly.

But it was answered two ways: first, that the King might by his letters patents ordaine, that from a Towne not corporate, should come Burgesses to be chosen by the inhabitants, and so is the case of many Boroughs and Townes in England, that have Burgesses by prescription, that never were incorporate, and therefore this liberty could not commence by grant but by ordinance, as the King may erect a Faire, or a Market, a Warren, Parke, Forest, Chase, Vicary, or the like, by Ordinance without granting it unto any.

The other answer was, that when there was a Corporation made by the Charter, and by the same an Ordinance that the Mayor and Burgesses should chuse &c. the law shall best this privilege in the whole Corporation in point of Interest, though the execution of it be committed to some persons, members of the same Corporation.

Huttons Case. Quare Imped.

Timothy Hutton brought a Quare Imped. before the Judges of Lancaster, and the truth of the case was thus; that he had presented one Rowth Clerk to the Bishop of Chester being ordinary, who refused his Clerke, and thereupon he complained to the Archbishop of York, who sent a Monition to the Bishop to receive the Clerks within a time, or else to appear before him and answer, who did neither: and thereupon the Archbishop did receive the Clerks and instituted him, and by his warrant he was also inducted.

Now the Bishop and one King a great Scholar, presented by the King, was in the Delegates, supposing that the institution by the Archbishop was void, and by consequence meant to avoid the induction too, as being without warrant, whereof the reason was, because the Archbishop did institute, &c. here at London being here in Parliament time, And they pretended that these Acts of his being then out of the Diocese were nullities: whereupon Serjeant Hutton prayed a prohibition, and this Court was of opinion, that this suit ought to be prohibited, for since by induction which is temporall Act, and triable by temporall law, the Church is full, it is not to be voided, but by a suit of Quare imped. or the like at the Common law, and not to be undermined by alleging insufficiency in the institution in the court Ecclesiasticall, for that may come in question upon the triall of the induction at the common law, which will not be good if the institution were not good, whereupon it was granted. But if this course might be admitted, they might show all plenalties in the Ecclesiasticall Court, or question them at least upon quarrell to the institution. But it was said to Serjeant Hutton that he could not pray his prohibition in respect of his Quare Imped. hanging, because of his owne shewing the Quare Imped. must abate, for the Church is full of his presentation, but he must make his surmise, that the Church being full (as supra) that they seeke (ut supra) without mention of the Quare Imped. And though this abduction and Church were in the County of Lancaster and the Quare Imped. there to be brought, and not here: and there also a Prohibition might be had, yet the opinion was, that this Prohibition might be granted also in this Court, because the title of the abduction is not hereby questioned, but the intrusion upon the common Law, (whereof this Court hath generall care)

Prohibition  
lies if the Ec-  
clesiasticall  
Court will  
question the in-  
stitution after  
induction.

Prohibition  
lies if the Ec-  
clesiasticall  
Court will  
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stitution after  
induction.

Prohibition  
lies if the Ec-  
clesiasticall  
Court will  
question the in-  
stitution after  
induction.

Void.

Prohibition  
for cause aris-  
ing in the  
Courts of  
Lancaster.

is

into heretofore, and the Prolocutor said, that they have commonly pro-  
hibitions into Chesser upon it. This act of Court was complained of in the  
thing, and he signified his pleasure both by Sir Thomas Lake and the Lord  
Archbishop of Canterbury, that he would have a consultation granted. But he  
answered his Majesty by letter, that we could not do it by the Law, and in the  
end after many passages to and fro, it was left and so it stood.

Every Ecclesi-  
astical Court  
must remit to  
the next Court.

As the opinion of the Court was, that if a suit be before an Archdeacon, where-  
of by the Statute of 23 H. 2. the Ordinary may license the suits to an higher  
Court; that the Archdeacon cannot in such case balk his ordinary, and send the  
cause immediately into the Archdeacon: for he hath no power to give a Court, but  
to remit his own Court, and to leave it to the next; for since his power was  
derived from the Bishop to whom he is subordinate, he must yield it to him of  
whom he received it, and it was said, that so it had been ruled heretofore.

Replevin.

Suff.

Trin. 10 Jac.  
Rot. 2508.  
Replevin must  
assigne a place  
as well as a  
towne.

### Read versus Hawke.

John Read brought a Replevin against Leonard Hawke for taking of his  
tithes at Oole, viz. one Gelding and one spare, to his damage, &c. The  
cause was brought upon the declaration, because there was no place assigned  
where the taking was, but only a towne. After argument of the law,  
it was assigned by the Court, that the declaration was naught for the cause  
aforesaid; for the generall Presidents of the Court and forme of declarations  
in Replevins is to assigne a place as well as a towne, and in such a case, as well  
the place as the towne are traversable by the avowant, wherein the Replevin  
differs from an action of trespass, wherein the plaintiff may assigne his tres-  
pass only in one towne, and if he doe assigne a place, the defendant may plead  
at another place without traversing the place assigned by the plaintiff, and  
then the plaintiff may take a new assignment, and the reason is, because the  
Replevin is an action of more certainty, and must of necessity containe a place  
in the Court, as is said by Bryan and Starkie in 22 E. 4. fo. 51. But the case  
that is cited here, was the case in 35 H. 6. fol. 40. which you may see in the book,  
&c. whereas the Record it selfe is found Hil. 35 H. 6. Rot. 466. Sarr. 2. *Alia  
prout pates terminus sancti Mich. Anno reg. Dem. Regis nunc 35 Rot. 241. con-  
victor fr. Johannes Astead summonitus fuit ad respondendum Johanni Dimmoche  
de placito quare cepit averia ipsius Johannis Dimmoche, & ea injuste detinuit contra  
vult & pleg. &c. & unde idem Johannes Dimmoche in propria persona sua que-  
ritur quod pred. Johannes Astead ultimo die Junii Anno reg. dicti Domini Regis  
nunc detinuit apud Toting in quadam loco vocat. &c. cepit averia, viz. tres  
vacca; & quantum horiculus ipsius Johannis Dimmoche & ea injuste detinuit contra  
vult & pleg. quousque, &c. unde dicit quod deterioratus est, & dampnum habet  
ad satisfactionem suam & inde producit sequestem & pred. Johannes Astead per W. Tway-  
les Attornatum suum venit & defendit vim & injuriam quando, &c. Et petit  
licentiam inde intendendi hic usque a die s. Hillar. in xv. dies, & habet, &c.  
Ad assensu pred. Johannis Dimmoche, idem dies dat. est eidem prefato Johanni  
Dimmoche & hic, &c. Et modo hic ad eundem 15. diem s. Hill. venit tam pred.  
Johannes Dimmoche in propria persona sua quam pred. Johan. Astead per Attor-  
num suum pred. super quo visa lecta & intellecta, &c. per justic. hic plac. pred.  
quod si narratio pred. nulla fuit in dicta in quo loco averia pred. capta fuit eisdem  
justiciariis videtur quod debis. advocacionem per pred. Ioh. Astead pro return  
Avetorum pred. habend. primis fact. extunc idem Iohann. pro insufficiencia  
narrationis pred. return. Avetorum illorum habere debet, &c. Et super hoc idem  
Ioh. Astead pro return. Avetorum pred. habend. bene advocat, captionem cornu-  
um Avetorum in villa pred. in quadam loco vocat. The Vicars land. Et justic.  
&c. hic dicit quod quidam Ioh. Careles vicarius Ecclesie s. Mich. de Toting  
hic ante tempus quo supponitur captionem pred. fieri fuit seissus de duabus acris  
terre cum pertinentiis in Toting pred. unde pred. locus in quo &c. est parcella  
ut Globa Ecclesie pred. in Dominio sui, de secundo in jure ejusdem Ecclesie, &c. hic  
inde*



*inde seiscius din ante captionem, &c. demisit prefato W<sup>ro</sup>. Astead pred. duas actas  
terra habend. ab eodem die per quinque annos tunc prox. sequen Quel W<sup>m</sup>. de-  
mise onstre al. defend. & issint avom pur damage feasant & petit returnum eorum  
dem averiorum, &c. Ideo concessum est quod pred. Ioh. Astead habeat returnum  
averiorum pred. &c. Et pred. Johannes Dimmocke in misericordia.*

But yet it is true that some declarations in Replevins are found without  
any other place and avowles and other pleas made upon them without Demat-  
ter or exception to that point, and then they are good enough.

### Doctor James's Case.

Serjeant John More moved this case, That whereas the Diocese of the  
Bishop of Winchester did extend it selfe to the Borough of Southwarke  
as part of the County of Surry, that Doctor James Judge of the audience  
of the Archbishop of Canterbury did of late use to keep a Court sometimes  
in Southwarke, and cite men thither from the remotest parts of the Diocese  
of Winchester, being sometimes 60 miles. And that further, if they keep  
not their day and houre of appearance, they were excommunicate, and then  
could not be absolved except they would yield to the transmitting of their cause  
into the Archbishops Court, whereby the statute of 23 H. 8. cap. 9. was di-  
rectly illaded, and this he moved atwell in the behalfe of the Bishop of Win-  
chester, as of the parties cited, and prayed a prohibition.

Whereupon, on the part of the Archbishop it was answered, that no such  
act of transmitting was used, but it was true that such Courts had been  
kept in Southwarke by the space of 40 years and better, and that by law they  
might be kept; for the Archbishop may sit in any Diocese of his owne Pro-  
vince, and may heare causes arising within that Diocese by his preroga-  
tive, for he hath a concurring jurisdiction with the inferiour Ordinary,  
but he cannot call them out of the Diocese by reason of the said statute of  
23 H. 8. cap. 9. And so the Bishop of Winchester had no wrong, and the party  
had no hurt, and he is not called out of his Diocese. Whereupon it was  
answered by the Court, that first the transmitting of causes (*ut supra*) was  
expressely against the said statute of 23 H. 8. Next, that the party in this case  
had a kinde of wrong. For whereas the Bishop of Winchester himselfe would  
not draw the people out of the heart of the Diocese where he lieth himselfe,  
the Archbishops officers would draw them thither as more commodious for  
them if it were permitted. Besides, it deprives the subject of an appeal which  
he should have had, if the cause had begun with the inferiour Ordinary.

And though the controversie concerning the jurisdiction be between spiri-  
tuali persons, yet the King is the indifferent Arbitrator in all jurisdictions  
whether spirituall as temporall, and that is a right of his Crown to distribute  
to them, that is, to declare their bounds. And it hath heretofore been held in  
this Court, that the supposed concurrent jurisdiction that the Archbishop of  
Canterbury is supposed to have in the inferiour Diocese was not as he was  
Archbishop, but as he was *Legatus natus* to the Pope, for the Archbishop  
of York neither hath nor claimeth any such, and then that power is ceased,  
being abrogated with the Pope, and the late practise (if any hath been) is  
but an usurpation. And if it be permitted to be in the Archbishops meere  
power, he may erect a Court of audience in every Province, and call all causes  
from other Ordinaries.

### Rich versus Kneeland.

Case.

John Rich brought an Action upon the case against Arthur Kneeland in  
Banco Regis, and declared that whereas the said Kneeland was the twen-  
ty day of January in the ninth yeare of the King, and long before had been

London.  
Trin. 11 Jac.  
B.R. Rot. 1549.

Action against  
a common  
Carrier for  
goods lost.

“ a common Hopyman to carry goods by water for hire from London to Milton  
“ in Kent, and from thence to London, and where by the custome of England,  
“ such Carriers ought to keep the goods delivered to them to be carried safely,  
“ so as they should not be lost by the default of them or their servants, that he  
“ had delivered to the defendant the same twenty day of January a Portman-  
“ teau with 50 l. in it to be carried &c. for which he gave him two pence, the same  
“ 20 day of January, and that the defendant had suffered the goods to be lost,  
“ through default of him and his servants, upon the 25 of the same January the de-  
“ fendant pleadeth that the plaintife the 21 of the same January did discharge him  
“ of the keeping of them, which the plaintife traversed in law and the defendant  
“ demurred. Nota, he pleads no discharge of the carrying: also the defendant by  
“ demurrer in law confesseth that there was no discharge, of the carrying, and it  
“ was adjudged for the plaintife. And now in the Erchequer Chamber upon a  
“ writ of error, the judgement is affirmed, and it was resolved that though it  
“ was laid as a custome of the Realme, yet indeed it is Common law.

Debt.  
Oss.

### Loggin versus. Tetherton.

Mich. 9 Jac.  
B.R. Rot. 626.

Trigintata  
libris.

“ William Loggin brought an action of debt of 30 pound against William  
“ Tetherton, and upon Oyer of the Obligation, it was in trigintata  
“ libris, the defendant demurred in law, supposing the obligation void. And it  
“ was adjudged good for 30 pound, and now upon a writ of error in the Erche-  
“ quer Chamber the judgement was affirmed.

Assumpsit.  
Mich. 9 Jac.

### Woolaston versus. Webb.

B.R. & Exch.  
Chamb.

Assumpsit to  
pay debt upon  
consideration  
of further day,  
no cause of  
debt.

“ Henry Woolaston brought an assumpsit against Edmond Webb, and de-  
“ clared that whereas Webb did owe him 30 pound in consideration that  
“ the plaintife the 28 day of August 1610. had given day to the defendant for  
“ payment of the same money untill the 9 of October following. That the de-  
“ fendant did assume to pay it him the same 9 day, and upon issue non assumpsit  
“ it was found for the plaintife, and damages given. Now it was assigned  
“ for error, because it was not shewed for what the defendant was indebted.  
“ Now the judgement was affirmed, for the debt was not in question, as if it  
“ had been an ordinary *indebitatus assumpsit* where the debt it selfe is the only con-  
“ sideration of the promise, for there it must appeare to the Court, but here it  
“ is the day given, that is the expresse consideration. And though it be true that  
“ there must also be a debt, yet this is allowed in the promise being actual, and  
“ also found by implication in the verdict.

Ejectione.

### Thomas Moore versus Iohn Musgrave.

Excheq.

Lease which  
seemeth doubt-  
full in the li-  
mitation of  
the Terme.

“ Thomas Moore debitor le Roy fuit plt. in ejectione firme per quo minui in  
“ Lescq. versus Johannem Musgrave defend. & count. q. un. W. Moore  
“ 5 Maii Anno 10 Regis nunc ad Clergill in Com. Cumbria leased al dis Thomas  
“ Moore le plt. un mease 40. acr. terre 20. acr. pree & 50 acr. passur' ove les  
“ appartenances in Clergill pred. habend. del Feast jour del Annunciation del blessed  
“ virgin S. Mary Donques darreine passe pur viginti un annis extant prochain  
“ ensuant & le ejectment est allegé d'estre le dit 5 Maii 10 Regis Sur rien culpa-  
“ ble trouve fuit un especiall verdict & ceo effect. viz. Que devant le dit demise  
“ le dit W. Moore fuit seise del dits terres in fee & sic seisit. le dit W. le dit 5  
“ die Maii 10. Reg. supradict fuit un Indenture del lease al dis Thomas Moore  
“ le plt. le quel est trouve in hec verba, (s. demisit tenementa pred. habend. le  
“ dit meas ou tenement, ove les appartenances from the feast of the Annunciation  
“ of the Virgin Mary last past, for and during the terme of 21 yeares next iq-  
“ suing the date hereof fully to be compleat and ended. Per force de que le  
“ plaint, fuit possesse tanq; fuit eject. per le defend. le dit 5 Maii 10 Regis, Mes  
“ quel

quel sur tout le matter le defend. fuit culp. del trespas & ejectment en le Count  
 mencon. ils ceo referre al Court.

Enq. le question fuit, si le leas trouve per le Iurie accord ove le leas mencon.  
 in le count per un terme d'ans ou ne my eò q, le leas per count fuit un leas fait 5  
 Maii 10. Reg. habendum de le seast d'annunciation donques darreine passe pur 21  
 mai extunc scil. del dis seast d'annunciation prochein ensuant. Quer de c' case. Mes le  
 leas trouve per le Iurie fuit un leas fait le dit 5 Maii 10 Regis per Indenture geren  
 dat. 5. Maii Anno 10 Regis habendum de festo annunciationis beate Marie vir-  
 ginis tunc nli. preterito pro term. viginti unius annor. prox. sequen. dat. dista Inden-  
 tura. It was adjudged for the Plaintife in the Exchequer, and now affirmed by  
 the opinion of the Chiefe Justice and my selfe, by the Lord Chancellor and  
 Treasurers.

Judgement.

### Fitzhughes Cafe.

Obligation.

Edwardus Bridge de, &c. gen. & Francisca uxor ejus alias dict. Francisca  
 Fitzhugh de &c. gen. summ. fuer' ad respond. Nichol. Fitzhugh gen. de pla-  
 citis quod reddant ei octi genta libras quas ei debent & injuste detinent, &c. Et  
 male, &c. Et count sur obligation fait per femme dun sola fuit. Quando, &c. Et  
 present auditum scripti pred. & eis legitur in hac verba. Noverint universi per  
 presentes me Franciscum Fitzhugh de Goodwick in Com. Bed. gen. teneri &  
 promitter obligari Nicholao Fitzhugh de Eaton in dicto com. gen. in octogint. libris  
 bona & legalis moneta Anglia solvend. eidem Nicholao aut suo certo Attornato  
 vel executoribus suis in Festo S. Michi Archangeli prox. futuro. Ad quam qui-  
 dem solutionem bene & fideliter faciend. Obligo me, heredes, executores & Adm.  
 non promitter per presentes sigillo meo sigillat. dat. vicesimo tertio die Novemb.  
 Anno regnor. Pbi. & Maria Dei gratia Regis & Regina Anglia, Hispania, Fran-  
 cia, uniusque Sicilia, Ieruf. & Hibernia, Fidei defensor. Archiduc. de Austria,  
 Duc. Burgundia, Mediolan, Brabantia, Comitum Hausbury, Flandria & Tyroll  
 quarto & quinto, quo pro & auditio iidem Edw. et Francisca petunt iudicium de  
 vero & narr. pred. quia dicunt quod pred. N. per br. & Narrationem suam pred.  
 suppon. quod pred. E. & F. debent prefato N. octigint. libras quas eidem N. red-  
 dunt, ubi revera non habetur aliquod tale verbum in scripto pred. continens &  
 warrantizans hoc verbum in br. & narratione pred. specificat. viz. octogint. &  
 in eodem scripto obligatorio pred. hac duo verba, viz. octi genta sunt script. et con-  
 tent. Qua quidem duo verba octigenta nullam habent in se significationem de ali-  
 qua summa certa, sciqz br. & narratio pred. non warrantizant de & super scripti.  
 pred. per prefat. N. hic in Curia probat. Per quod iidem E. & F. petunt iudicium,  
 & de breve & narr. pred. &c. Et quia pred. N. exceptionem pred. q. per inspecti-  
 onem brevis narr. & script. pred. Cur. hic satis constat non dedit, ideo concessum  
 est pred. N. nihil capiat per billam suam, sed sit in misericordia pro falso clamore  
 suo &c. Et quod pred. E. et F. eant inde sine die &c. Concessum est etiam quod  
 pred. E. et F. recuperent versus prefat. N. dampna sua occasione premissorum ad  
 tempus eidem E. et F. per discretionem Iustitiariorum ad requisitionem suam pro-  
 missu et custagii suis in ea parte sustentat, iuxta formam stat. &c. per Curiam hic  
 adjudicat.

Mich. 3 & 4 El.  
 Rot. 1350. C.B.

In au obligati-  
 on octigentas  
 for octoginta.

### Parker versus Keneday.

Obligation.

N Arr. per Parker versus Keneday, et sa femme sur deux obligations un de  
 60. lib. et l'auter de 40. lib. defendens petit auditum pred. primi scripti et  
 elegit in hac verba, Noverint &c. in sessanta libris &c. quoad pred. 60. lib.  
 de pred. 100. lib. defendens demurre et quoad alteram obligationem non est factum  
 et iudicium sur demurrer pro quer.

Tr. 6. Iac. Rot.  
 1020.  
 Sessanta libr.



Obligation.

Mafdame verſus Iolly.

Hil. 10. Jac. Rot.  
1830.

*N* Arr. per Maſſam verſus Jolly, ſur bond pro 60. lib. defendens petit auditum  
ſcripti &c. et ei legitur &c. Noverim &c. in ſexaginta libris &c. et ſur co  
Demurrer et Iudicium pro quer.

Warrant, Chart.  
North.

Sir Henry Roll the younger Knight againſt  
Sir Robert Osborne.

Trin. 9 Jac.  
Rot. 2205.

The learning  
of warrantia  
Charte and of  
warranties ge-  
nerall at large.  
Judgement  
was given for  
the defendand.

Non-ſenſe.

“ Sir Henry Roll the younger Knight brought a Warrantia Charta againſt  
“ Sir Robert Osborne and Margaret his wiſe, that they ſhould warrant  
“ unto him one ſpeſſuage, ſoety Acres of ſpendow, and ſeven hundred Acres  
“ of paſture in Kill-marſh, and declared that Robert Osborne, Margaret, and  
“ one John Gebert did levy a fine, an. 2, of the King unto the ſaid Henry Roll  
“ of the ſaid Tenements, inter alia by the name of the manor of Kill-marſh,  
“ and divers other quantitties of lands, and by that fine Robert Osborne and  
“ Margaret did grant for them and the heires of Robert, that they ſhould war-  
“ rant the Manor, and other the promiſſes to the ſaid Henry and his heires  
“ againſt him and his heires, and againſt all men; which fine as to the ſpe-  
“ ſuage and lands in queſtion was to the uſe of Henry Roll and his heires,  
“ and then ſhewes that he being ſo ſeſſed, one Ralph Perne did implead him  
“ by writ of *Entrie ſur diſſeizin in le Per* in the common Pleas, for the houſe  
“ and lands in queſtion (but doth not tell otherwiſe where) hanging, which  
“ plea Henry Roll required the ſaid Robert and Margaret to warrant unto  
“ him the ſaid ſpeſſuage and lands in queſtion, or to miniſter unto hims plea  
“ in barre of the ſaid action, which to doe they reſuſed to his damage of one  
“ hundred pound.

“ To this the defendand pleaded, confeſſing the fine, warrantie, and uſe, but  
“ further ſaith, that Henry Roll being ſeſſed of the tenements in queſtion by  
“ force of the ſaid fine, that one William Gibbs and Thomas Stephens Eſquires,  
“ beſore the purchaſe of this writ of Warrantia Charta, ſcil. the ſeventh day  
“ of November, in the ſecond yeare of the King, did ſue a writ of *entrie in*  
“ the Poſt, againſt the ſaid Henry Roll of the ſaid ſpeſſuage, and lands in  
“ queſtion, inter alia per nomina *Maneriorum Kilmarſh &c. rector. xv. Martini;*  
“ At which day the demandants, and the ſaid Henry Roll *ad tunc tenens liber ten,*  
“ *Maneriorum &c. exiſtens* did appeare. And the writ was returned, and the  
“ demandants declared and demanded all the manors, &c. And Henry Roll  
“ the tenant called to warranty Robert Osborne Knight, without ſaying *pred.*  
“ Robert Osborne, and he the common *bonchee*. And ſo the recovery paſſed,  
“ and a writ of *ſeiſin* of all the manors &c. And that the ſame recovery as to  
“ the ſpeſſuage and lands in queſtion, was to the uſe of Sir Henry Roll for  
“ his life, and after his deceaſe if a marriage ſhould be had betwene him and  
“ one Katherine Haſelwood, then to the uſe of her for life, and after to the uſe  
“ of any other woman that he ſhould marry, and then to the uſe of the firſt  
“ ſonne of his body by Katherine Haſelwood, and ſo to the tenth, one after a-  
“ nother, and then to the uſe of ſuch perſon as ſhould be heire male, of the body  
“ of the ſaid Henry Roll, and the heires males, of his body, and after to  
“ the uſe of Henry Roll, Father of the ſaid Henry the plaintiffe, and after  
“ that Henry the plaintiffe, is yet alive and ſo demands Judgement of the  
“ action, and the plaintiffe thereupon demurres in law, and ſo the demurrer is  
“ joyned.

I will handle this caſe ſo as beſides the points concluding, I will by the  
way diſcuſſe all incidents to a writ of warranty of Charters.

The caſe is rare and of importance, for a ſuit is *pugna civilis*, whereof Bracton  
ſpeakes prettily, *tractatu de warrantia charta capitulo ultimo: ſicut aliores ar-*

Bract. tr. de  
warr. Ch. cap.  
ult.

MANIUS

*mutur actionibus et quasi gladiis accinguntur, ita res munimur exceptionibus et defenduntur quasi Clypeis.*

The writ of warrantie of Charters, as to the fixing of the warrantie, and having the possession of the warrantie, is either provisionall or remediall.

The first is in case of feare and provision.

The second in case of losse already suffered and to be recompensed by value  
*per exambium*, as Bracton speaks.

Bracton.

I hold therefore first that nothing appeares in the Count in the principall cause, but that the plaintife ought to have Judgement.

I hold againe that upon the barre confessed by the plaintife demurred Judgement is to be given against the plaintife.

A writ and Count in a *Warrantia Charta* must have foure points compleat in them, that is to say,

First, he that bringes it must be tenant of the land, the day of the writ pur- Point. 1.  
chased.

It must be by a conveyance, whereby the land whereunto the warrantie is Point, 2.  
granted must passe, or at the least if right be released, or confirmation made with warrantie, he must be Tenant of the land to whom it is made in war- rantie.

This writ must be brought hanging the principall Plea.

Point. 3.

It must containe the specialty of the warrantie and lien.

Point. 4.

All these parts this writ and Count both containe, and yet being these rules made distinctions, I will explaine them, that it may appeare how they stand with their distinctions.

And as to the first point.

The plaintife is made tenant of the land in demesne, for of that there hath Explanation  
the great question whether the voucher or defendant in the *Warrantia Charta* of the 1. point.  
grants a warrantie over, may have a *Warrantia Charta*, whereof I make the relation upon all the booke thus. That it is a good Plea in the *Warrantia Charta* that the plaintife was not tenant of the land the day of the writ purchased, and so are the booke of the 24 E. 3. 25. 7 E. 4. 12 & 17 E. 3. 44. 16 H. 3. *Garrantie des Charters* 29 Bracton *tractatus de Warrantia Charta* 18. Thus *Warrantia Charta* defendens potest excipere quod querens non tenet terram de qua petit *Warrantiam*.

But it seemes to be a Plea but *prima facie*, for so it is allowed also 7 H. 4. 18. And yet it is concluded that the voucher may have the writ, when he cannot bouch, even as a second or third means Lord, may have a writ of mesne asswell as the Tenant in demesne, and so 3 E. 3. Fitz. *Warrantia Charta* 4. the defendant pleaded, that the plaintife was not tenant the day of the writ and issue upon it; But Fitz. abridging the case saith, that if he had pleaded himselfe Tenant by voucher, the day of the writ purchased, it would have serbed, and 31 E. 3. Fitz. *Warrantia Charta* 22. in fine, Burton saith, that the defendant in *Warrantia Charta* shall have a writ of warranty of Charters over hanging the writ against him, and reason and Justice requires it, for since this writ is supplementary in place of voucher where that cannot be had, therefore is this writ as well to be allowed after alienation as voucher is allowed, for alienation cannot be imposed unto folly, for as a man may bouch committing in as voucher; so since this writ as it is in nature of a voucher, is equally to be allowed: And therefore 41 E. 3. 7. if the Tenant by the Courtlesse grant his estate with warrantie unto I. S. and comes in as voucher, he shall have aide of him in reversion, as if he were Tenant in possession, and 43 E. 3. 23. If a Copartner make a leasehold with warrantie, and comes in as a voucher, he shall have aide to deraigne the warrantie paramount, as if he were in possession, but where it hath been said, that upon a release or confirmation with warrantie, a man cannot bouch, and therefore he shall have a warrantie of Charters, 12 H. 7. 12.

It is cleare that as to him that warranted he may, 4 E. 2. Fitz. voucher, 244. & 11 H. 4. 11 H. 4. 19. 38 E. 3. 13. But the cause may be so, as the de- mandant

mandant may counter-plea the voucher, and then the tenant is driven to his warrantie of Charters, ſo; default of his voucher in deed: And ſo the books 12 H. 7. is in that ſenſe true, ſo; if the defendant ſhould vouch as he may againſt the voucher, and be counter-pleaded by the demandant, truly hee ſhould loſe his land and the aide of voucher too, ſo; he were paſſed the requiring of a new plea of the warrantie, when he had been by the voucher counter-pleaded beſore.

Explanation  
of the 2 point.

As to the ſecond point, ſee 24 E. 3. 35. where the plaintife in warrantie of Charters counted, that the demandant infeoffed him by the Charter with warrantie, the defendant pleaded *riens paſſa per le fait et Braſton traictatus de Warrantia cap. 9. Sect. 5. Excipere poteſt Warrantus quod licet Charta de Feoffamento ſufficiens fuit tamen donum fuit inſufficiens quia donatus nunquam habuit ſeiſinam in vita donatoris, ſed poſt mortem ſuam intruſit.*

Alſo 44 E. Fitz. Garr. Char. 18. upon a releaſe with warrantie pleaded, that the party to whom the releaſe was made, had nothing at the time of the releaſe made.

Explanation  
of the 3 point.

And to the third point, the Reſiſter 158. affirms that Rule, and addeth, *ſi iudicium inde redditum ſit, non valet hoc breve.* But this muſt be well underſtood, ſo; clearly it may be brought beſore any principall plea, and after the plea take any other end then by Judgement or diſcontinuance and the like. And I am of opinion, that beſore execution, it may be brought if the party prayed his plea in time, ſo; till execution, he is in of the eſtate warranted: but if the execution be had, then the warrantie failes with the eſtate.

Explanation  
of the 4 point.

To the fourth point, This wiſt and Count is in place not of the voucher, ſo; this is general, but of the deratigning of the warrantie in caſe of a voucher, and yet in ſome caſes it ſhall not need to be ſo ſpeciall as the deratigning, and therefore if a man bring a *Warrantia Charite* upon a warrantie of land and ſhall obtaine judgement, he ſhall uſe that Judgement after ſo; rent demanded is recovered, if the warrantie did extend unto the rent 31 E. 3. Fitz. Garr. Char. 22.

And yet upon a voucher in like caſe it ſhould have been moze ſpeciall, the reaſon is apparent, ſo; the rent is demanded when he voucheth, but if it may be it was not ſo; knowne that rent would be demanded when the wiſt of warrantie of Charters was brought, but if it were, he ought to declare ſpecially the rather, if he cannot vouch in the principall plea of the rent, ſo; there muſt be a meanes to diſcuſſe whether the rent in demand be to be warranted as a rent ſuſpended when the warrantie was made, ſo as the land was warranted and diſcharged of rent.

Object. 1.

Now, to the objections that have been, or may be made againſt the Count. Firſt, it may be objected, that he makes the cauſe of action, becauſe he was impleaded in a wiſt of entrie *in le Per*, in which action he may vouch, and then by Fitz. N. br. 134. D. & I. it may ſeeme he cannot have this wiſt. To this I anſwer that the wiſt of entrie *in le Per* doth admit a voucher indeed, but that muſt be within the line; but the wiſt of entrie *in le Per* in the declaration is laid generally and ſo might be in the *Per* by ſome other, and not by Osborne, and then by that means being deprived of voucher, he muſt be admitted to this wiſt; ſo; ſo it is provided by the Stat. of Weſtm. 1. cap. 39. expreſſly.

Anſw.

But my plaine Anſwer is, that the wiſt of warrantie of Charters will lye upon all actions real, and may be brought either beſore or hanging thoſe actions though a voucher lye in the actions, and ſo it is reſolved 9 E. 2. Fitz. warr. Char. 30. 18 E. 3. 42. Fitz. Garr. Char. 8. though it be in a *Formedon*, this is beſt in the abridgement, and 2 E. 3. fo. 6. in warrantie of Charters againſt the heire, he pleads that the *Formedon* is hanging of the ſame land, *et non allocatur*, although he may rebut. 41 E. 3. of Garr. Char. 19. in *Formedon*, and Fitz. Nat. 135. D. where his words are, that a man ſhall have a wiſt of warrantie of Charters, though he may vouch in the action that is brought againſt him, and if he recover and after loſe in the action wherein he voucheth, he ſhall have a wiſt of *Habere facias ad valentiam* within the yeare after a recovery in *Warrantia Charta*, and the reaſon of this is cleare, ſo; he ſhall binde the land from the eſſe of the *Warrantia Charta*, (though he cannot have execution untill he take loſſe) And



And upon the voucher he ſhall have it but from the time of the voucher which may be delayed; And therefore I am of opinion, that he may bring it even after voucher, becauſe that action may be diſcontinued and take many waies, and ſo the warrantie of Charters be neceſſary, and this reaſon is expreſſly given both in 9 E. 2. and by Fitz. Nat. br. And Fitz. Na. br. in other places 135. A. muſt be underſtood that he muſt not relie upon this warrantie of Charters; but he muſt alſo voucher and requeſt plea according to his caſe, as he ſaid, 135. A. And laſt 19 E. 3. F. Gaſty chres 9. 31 E. 3. F. Gaſty chres 22. 18 E. 3. 42. F. Gifty chres 8. beſt in the abſidgement as beſore I have ſaid, and it is beſt for him that is to warrant, to make entrie of the plea that he tenders in the record of the action in which he is to plead *per Brian*, 16 H. 7. 6. yet I ſee not well how that can be, for both requeſt and tender are matter of fact.

And thereupon another objection may be made, that ſince he ought to voucher *Object. 2.* and hath not, he can have no benefit of *warrantia charta*.

This is already answered in part by the nature of the voucher in the lien, *Anſw.* and alſo it appears not that it was come ſo farre as he might voucher.

If it be objected that he hath laid that he did requeſt to have a plea in barre *Object. 3.* miſtred where the voucher may plead in abatement as well as in barre as matter of the demandant ſince the voucher: For if it were beſore, it muſt be pleaded by him to extort the warrantie, becauſe the tenant did not plead himſelfe.

It is answered that he counts that he did require the defendant to warrant the land which is enough; And ſo is the booke of preſidents, for that impoſes that he ſhall warrant according to the nature of the caſe by voucher, if he be bound; or otherwiſe by plea, and therefore the adding of requeſt of plea in laſt is ſurpluſage.

It is excepted that he hath declared to his damage where no loſſe appears. *Object. 4.*

It is true that he ſhall recover no damages but where he hath taken loſſe by recovery already had againſt him, 41 E. 3. 7. 3 E. 3. 21. & 18 E. 3. 42. F. Garr. Chart. 1. and therefore he ſhall not have damage where the warrantie of Charters is brought beſore the action *quia timet*. And ſo is 21 H. 6. 22. and therefore if it be pleaded by the defendant, that the plaintiffe is not impleaded, the plaintiffe ſhall patiently have his Judgement, but no damages. But yet he ſhall declare to damage according to the ſoyne, which is not ſtrange in many caſes as in a *Quare impedit* for the ſoyne.

Thoſe whereupon the plaintiffe may have damage, is not onely where in the principall action damages were recovered againſt him as in an Aſſiſe of the like; but alſo where the land hath been recovered onely, as in a *Formedon* of the like, 41 E. 3. F. Garr. Chart. 19. 42 E. 3. 7. 43 E. 3. 20. But yet the caſe of 41 E. 3. 20. is *Inter Anomala*, for that the caſe was, that where one Charnell had made a warrantie againſt himſelfe and his heires, and all others ſuing by his colluſion; upon a *Warr. Charta*, it was found that the principall action (a *formedon*) was brought by his colluſion yet he could have no damages, becauſe he had not loſt the land, whereupon he had now brought a writ of deceit upon the trouble and charge that he ſuffered by colluſion and ſuit, and declared upon the verdict in the *Warr. Charta*, finding the colluſion as binding the defendant for that point. And ſo becauſe the defendant could not deny that the Court gave judgement and damages. But note that this ſoyain action is no ground for the like in other ſuits of warranties of Charters; for this particular warrantie grew upon a colluſion, which is nothing to other warranties; and ſuch a practice by colluſion will beare an action without warrantie. The onely uſe of that caſe was, that they allowed the verdict in one action to be a conviction of colluſion in another, which was hard enough.

As to the objection made by my brother Nichols, that by the Count it ſelfe *Object. 5.* appears the warrantie is loſt, by reaſon that this part of the land is declared upon the fine, to be to the uſe of the plaintiffe, and the reſt ſhall be intended to the uſe of the defendant who made the warrantie.

I answer it three wayes.

Answer 1.

If first, that there can be no inference touching the use of the rest, because there is no mention of it in the Count, but a meere omission, neither is there any cause that it should be holden confessed and not denied, for it is in no sort within the count or the reason of it, which is to demand onely warrantie of this parcel of land which was put in suit in the writ in the *Per*, so there is no cause for this purpose to speake of the rest of the lands, saving the necessity of the forme in pleading a fine or recovery, which is a record which must be entire, whereas if it had been a feoffment, it might have been pleaded for this parcell of land onely, 22 E. 4. 8.

Answer 2.

Another answer is, that it appeares out of the barre of Osborne, that the whole Spanoz, &c. was demanded in the writ of entry in the post against the plaintife Sir Henry Roll being tenant of it, and that he vouched of the whole, and judgement passed, which proved by the confession of Osborne (that is, to impeach the warrantie) that he was tenant of all and so he must have the use of all.

Answer 3.

Another answer is, That a warrantie may be extinguished indeed by release to him that warrants, but it is against nature to say, that any thing can be extinguished that never was, for here the cognitor should make a warrantie, provided that it should be no warrantie or voyd, so the same man that makes it should kill it in the birth, therefore I hold it plaine that the warrantie which seemeth literally intire, shall by act of the party, and construction of the law be divided in this case, since it cannot take effect according to the entire word: as if I infeoffe H. of 100 acres in fee to the use of himselfe for 50 acres, or of the feoffee or of a stranger for the other 50 acres certaine, and warrant the lands to the feoffee and his heires; this warrantie is clearely divided by the meaning against the letter for the warrantie is so much as is to the use of the feoffee himselfe and his heires that doth warrant never tooke effect, and when it is divided to two, that word that seemed entire at the first, is to be taken *reddendo singula singulis*; for this purpose, the case of the Lord Dacres 26 Eliz. was resolved thus, William Lord Dacres made a deed of feoffment of lands in divers Counties dated 15 Oct. 4. Maria upon condition the feoffee should infeoffe him of all the lands within 20 dayes after the date of that deed, and it was resolved, that if William Lord Dacres did make his feoffment, but of part within the 20 dayes, the condition was not broken though all were not reconveyed within the 20 dayes according to the letter of the condition which is intire as the warrantie, the reason was, because it was his owne fault, that it was not conveyed, without which it could not be reconveyed, and therefore the letter was abridged the condition being taken that he should convey so much as was conveyed. But now the case standing thus upon the plaintifes declaration, all the impediments arise upon the Plea of the defendant, which is confessed by the demurrer. Out of which arise these points:

Now to the Barre.

1

That the plaintife having the whole Spanoz conveyed unto him by fine with warrantie from Osborne.

2

He hath divided the land.

3

Part he hath divided and changed the estate:

4

When he hath done this by common recovery, by which they that come in are in the post.

5

Again he hath vouched Osborne once already in that common recovery, and so hath had recompence or possibility of it by Judgement,

This point is to be understood if the voucher of Osborne, as is already alleged, shall be understood of the same Osborne, because it wants the word *predict.*

6

But if it shall not be understood the same, then it will come to this question. If a man have divers warranties against divers persons, and then in an Action brought against him voucheth one, and omits the other, and so a recovery

very paſſeth with a judgement of a bailee, whether he can ever have benefit of the other warrantie.

And upon this will ariſe a queſtion by way of diſtinction, whether this will be all one where the recovery is upon title, and where it is a common recovery, and under what differences. And firſt in generall, which is a kinde of key to the particulars that ſhall follow, I obſerve that a warranty is a great ſervitude upon him that warrants, and upon his eſtate, and is a ſervitude againſt common right, and hangs like a cloud over him and his inheritance, as Hanniball ſaid of Fabius Maximus, ſo it is in law taken ſtrictly and literally.

And therefore if a man convey land with warranty againſt him and his heirs, his heirs on the part of the mother ſhall not be vouched by this, as long as there is an heir on the part of the father, 19 R. 2. ff. Garr. 100. 49 E. 3. 11. except it be by reason of a ſigniorie of lands of the part of the mother 5 E. 2. Fitz. Monach 207. And if he that warranted have no lands but Chelkinde, yet the tenant may vouch the very heirs alone, 38 E. 3. 22. but it is true that he may vouch alſo the other heirs for poſſeſſion, and ſo he may vouch together with the mother which is heirs unto the father warrantor, the ſister who hath the land by poſſeſſio fratris. 32 E. 3. ff. Woucher 94. 43 E. 3. 3. But if the land warranted comes unto a ſister by poſſeſſio fratris or to a younger brother by Borough English in Chelkinde, he is without remedy, for he cannot vouch as heirs alone, except he come in as vouchor for poſſeſſion with the very heirs, 32 E. 3. Fitz. Woucher 94. & 35 H. 6. 33. Yet note that if a man binde himſelfe and his heirs in an obligation, and leaves land at common law and land in Chelkinde, the creditors muſt ſue all the heirs 11 E. 3. F. debt 7. 11 H. 7. 12. And ſo in that caſe if he have one heir on the part of the father, and another heir on the part of the mother, and both have land by deſcent, he ſhall have ſeverall actions, and executions ſhall conſtitute he may take it againſt both; ſo it appears that the conſtruction of law is ſtrict where the heirs are charged with warranty. Recall then where he is charged with a chattell. Upon the ſame reaſon is the caſe adjudged 18 H. 3. ff. Woucher 181 & 23 E. 3. ff. Garr. 77. If a man grant a ſigniorie with warranty, and the land ſcheates, the warranty is utterly loſt, and not only for the overtaking though it come by act in law, for the booke of 23 E. 3. ſayes, that a covenant ſhall be taken ſtrict, per Welby; and that the warranty is loſt is adjudged 18 H. 3.

Charge of  
heires upon  
warranty or  
upon  
obligation  
diſſer.

Now to the firſt objection that the demandant hath divided the land by his own act, ſcil. the recovery after the warrantie created. It is to be obſerved that the warranty muſt remaine entire as it was created without the voluntary diviſion of the party. And therefore if land be given to two jointly with warranty, if the one make a ſeoffment of his part, he hath loſt his warranty, but the other may vouch for his moiety, but if they make partition, both have loſt it by the common law. And if the warranty were to the ſoytenants and their aſſignes, the aſſignment muſt alſo be joyned, 29 E. 3. ff. Garr. 70. 11 E. 4. 8. Coke lib. 4. fol. 36. Terringham's caſe. If a man have a common appendant in 40 Acres, belonging unto 20 Acres, if he ſell 10 of his Acres or buy part of the 40 Acres, the common may be divided and apportioned *pro rata*; but if it be a common appurtenant becauſe it is againſt common right it is loſt.

To the firſt  
objection, viz.  
The dividing  
of the lands,

If a man have a rent charge granted him of twenty pound a yeare, and he grant 5 pound a yeare of it to a ſtranger by fine, the tenant is not compelled to Attorne.

As in theſe and the like caſes againſt common right, I muſt not be made ſubject to divers vouchers or ſuits of warranties of Charters, or to ſundry diſtreſſes where my grant made and meant but one.

Now ſecondly, where he hath changed his eſtate, the caſe is worſe, for the eſtate muſt remaine the ſame in the poſſeſſy, or muſt be made the ſame in reſpe-  
ſentation that it was in the time of the warranty created, when you come to vouch or to bring your warrantia charte; and therefore if the husband and wife be ſoytenants and a releaſe be made to them with warranty, and then the husband alone makes a ſeoffment over with warranty and is thereupon  
C  
vouched

To the ſecond  
objection, viz.  
the changing  
of the ſtate.



vouched alone, he cannot vouch over, 10 E. 3. 52 Fitz. Counterplea of warrantie 15.

So if a woman tenant in fee and her husband make a lease *per annu* 27, if in an action they be received they cannot vouch over, 45 E. 3. 18. & 46 E. 3. 24. But if the lease had been only for the life of the woman, upon the receipt they might have vouched, for by representation they are in of the first estate.

As when lands and warranties descend to two parceners and they make partition and one of them is impleaded, he shall not vouch alone, but shall pray aid of his fellow, and so shall put themselves in representation of one helre, and then vouch together. But if one parcener alien his part or make default upon aid prayed, the other shall vouch alone, 27 H. 8. 58. 4 H. 7. 2. 20 H. 6. 2. & 43 E. 3. 23.

If two coparceners be, and one of them alien with warrantie and comes in as voucher, now he shall pray in aid of his fellow, and either have *pro rata* upon the loss or vouch over with him upon the Warranty paramount.

But note in these cases, that the voucher (when he will avoid the warranty by change of estate) he must shew how the estate is changed, 3 E. 3. 51. And so hath the defendant done here in the principall case.

And as this case is here it is yet more dangerous to the defendant, for though it be true that if a man enter into a warranty generall, he shall warrant no other estate then that the tenant hath, 44 E. 3. 38. 41 E. 3. 7. where the voucher demands not the lien, nor the tenant makes not any speciall declaration of it, as in the warrantie of Charters he doth, yet speciall circumstances may worke the contrary. And therefore 41 E. 3. 25. if the voucher enter with a Protestation of an especiall estate in the tenant who admits it, the voucher shall warrant no other estate, though it be greater.

So likewise if the tenant prayeth warrantie of an estate certaine, and the voucher admits it, he shall make that good, though the estate in truth be less, and therefore 38 E. 3. 9. 14. if one hold land only for terme of his life, and I warrant the land to him and his helres: if I shew this upon the voucher, he shall recover but for life, but if the deed be entred, and I except not to it, Brook recovery in value 8. I shall answer fee simple.

Such more plainly here in the principall case, where the declaration is expressly upon a fine and warrantie in fee simple truly; upon which he demands judgement accordingly for a warrantie of fee, so that if there were nothing else, this alone were cause to barre this action, since in truth he hath but an estate for life. And yet if the defendant should yield to his demand, he should answer fee simple; and if judgement should have passed according to the declaration in this case, and execution should have been after sued upon it, it had been then too late to have pleaded this which he should have pleaded before in the former action, 21 H. 6. 41. & 22 H. 6. 22. F. Garr. Char. If a disseisor in an action brought against him vouch or make request to have a plea mixed into him or bying a writ of *Warrantia charte*, and then after that the disseisor enter upon him and put him out and he reenter, so that he is in of another estate then was warranted, yet he shall recover. But otherwise it would have been if the entrie of the disseisor had been before the voucher request and writ, for then the voucher or defendant might have shewed, that he had been in of another estate at the time of the voucher and writ. Out of which case cited and allowed by F. Na. br. in this writ de war. Char. I am cleare of opinion that if a man have land conveyed unto him with warranty, whereupon a stranger hath right to enter, and he bying his writ of warrantie of charters, and hath judgement, though the stranger after byings no action but enters, he shall have his execution, for a voucher and request of plea are required where they may be had: but in case of entrie it may not be, and the warrantie is against all eviction by eigne title, either by entrie or by action: to which I note to warne men how they proceed against an *Ejectione firma*, where no voucher nor request for plea can be had; for if a man foreseeing that his title is defeasible by entrie bying his writ of warranty of charters against his feoffee, and

and hath judgement, if the ſtranger that hath right of entry ſeale his ſeale, this entry gives cauſe of recompence, but let him look that he bring his action in time.

The next is, becauſe the plaintife and his Father who is in the laſt Rem. in ſte, and the reſt come in by recovery in the poſt, in which caſe they can take no benefit of the warrant, which can be extended no further then as it is limited; that is, either to the parties or their heires or Assignes and he that recovers is neither, but above that eſtate, and where one comes under the eſtate, yet if he is not in the per by him to whom the warrant was made, he is out of the benefit.

And therefore 22 Aff. 37. & 22 Aff. 69. If tenant in Dower inſeoffe a villein with warrant and dye and then the Lord enter and be impleaded, he cannot vouch the heire of tenant in Dower; and if the Lord had entered before the death of the tenant in Dower that made the warrant, and then the heire dyed, the Lord could not ſo much as rebut the heire.

But becauſe this is a common Recovery, I will enlarge a little at my ſelfe in it, for learning ſake and for uſe, though it makes not diregly for the caſe.

I am of opinion, that if a man convey land to me & my heires with warrant, & I make a Feoffment or leſſe a fine, or ſuffer a recovery without vouching my feoffor, to the uſe of my ſelfe and my heires, that yet I may vouch my Feoffor as I might doe before, for this is my old fee ſimple, in the ſame degree and ſtate in effect as before.

And therefore if I have lands that I hold in Knights ſervice by priority and ſuperiority, and doe make one joynr Feoffment of them to mine own uſe, yet the priority ſhall remaine as before, according to the former priority, for it is ſo agreed, as it is holden in the caſe of the Abbot of Bury for the wardſhip of the lands of Bokcham Dier 28 H.8. fo. 11. A. 2. 6. But this caſe of priority is there cited, as a caſe ruled between the Lord Roſſe and the Lord Dacres, for the wardſhip of the heires of Conſtables, for it was holden that the new uſe and ſtate was to agree the ſame as before. And ſo the principall caſe there is that if I in my ſelfe ſ. to the uſe of himſelfe in tailed remainder to mine owne right heires, this is a Reversion.

This point is clear in caſe of a recovery upon title, ſo it is alſo in caſe of a ſtate held in the poſt, aſſenant in Courtſie, Dower, Lord of a villein, or by Cſcheat, where one leſſe a fine to me in fee, with warrant to me & my heires, & I ſuffer a common recovery, againſt me to mine own uſe, as before, my warrant remaines, in I am in by him as I was to before, and if the warrant were to me, my heires or Assignes, and I ſuffer the Recovery to the uſe of a ſtranger, he ſhall vouch my feoffor, as my Assignee, ſo common recovery is indeed an Assignment.

As to the point of vouching Osborne, or ſuing Warrantia of Charters against him, having formerly vouched him and had judgement and recompence, it is cleare he cannot have recompence againe, for the warrant is executed, ſatisfied & ſorted in the firſt, as in a Scir-fac. to execute a fine, it is a barre to plead, that it is executed already, and that the demandant, his Anceſtors have been ſeized by force of the fine 23 E.3. F. Garr. 77. expreſſe. If I have recovered in value, I ſhall never vouch againe, for thoſe lands by force of the firſt warrant, becauſe it was once executed. And by the ſame reaſon, if I once have had judgement to have value upon a warrant, I ſhall not vouch againe upon the ſame warrant for the ſame land.

And if you will reply to me that the warrant in queſtion is by Osborne and his wife, and the former voucher was of the huſband onely, I anſwer, that then it muſt be underſtood that they are two ſeverall warranties, and then in vouching the huſband onely he renounceth the warranty of him and his wife, as after ſhall be ſhewed, but it cannot be ſaid in this caſe, that the warranty by the wife ſhould be void, or ſo ſuppoſed, as in the caſe 10 E.3. 52. where warranty upon a releaſe being made to the huſband and the wife, the huſband alone vouched over and averred that the wife had nothing, and therefore the warranty was void unto her, which is alſo the reaſon in the judgement of the caſe of Eare and Snow Plow. 540. That the common Recovery againſt Tenant in tail and his wife having nothing ſhall bind the tail. But where

To the third objection, viz. the doing it by Common Recovery.

To the 4. Point. of ſuing Osborne in a war' char' who had been vouch once before.

the woman warrants on the contrary part, ſhe is bound though ſhe hath nothing, yet it is true that to ſeverall reſpects a warrantie may receive ſeverall ſatiſ-  
factions by parcels, but not totally. And therefore Hill. 5. Jac. Regis Rot. 241.  
in the Kings Bench the caſe was this; That one John Rudge did grant cer-  
taine lands in South Molton in com. Devon. unto John Pincombe, for his  
life in the fifteenth yeere of Eliz. and in the 30 yeere demised the ſame unto  
one William Hunt for 21. yeeres to beginne after the death of the ſame John  
Pincombe, and after 32. Eliz. granted the reversion of theſe lands unto Amy  
Pincombe and others for their lives with this expreſſe claufe of warrantie fol-  
lowing. And the ſaid John Rudge and his heires all the premisses unto the ſaid  
Amy againſt all perſons claying by the ſaid John his anceſſors or heires ſhall  
and will warrant, acquit and defend during the ſaid terme. John Pincombe  
Attorned and died, Amy and the reſt entred, upon whom William Hunt the leſſee  
entered, whereupon Amy and the reſt brought their action of covenant againſt  
John Rudge to the damage of 200. pounds: And the defendant pleaded in barre,  
that the plaintiffe had formerly brought a *Warrantia charta* againſt him upon  
the ſaid warrantie for the ſame land and that it was yet hanging undetermined;  
and the plaintiffe demurred in Law, and it was adjudged for the plaintiffe, and  
upon a writ of error brought in the Erchequer Chamber, the former judgement  
was affirmed; the reaſon was, that though the warrantie was annexed to  
the freehold, yet becauſe the impeachment was onely by a leaſe for yeeres, for  
which there could neither be voucher nor *Warr. Char.* nor if judgement had been  
given in the *Warrantia charta*, could any execution be made in value for ſuch  
a leaſe, therefore it was holden as a warrantie reall, if the freehold were  
brought in queſtion. But when a Leafe for yeeres is in queſtion taken out of  
the freehold, it is to be uſed as a perſonall covenant, and to be ſatiſſied in damages.

Out of which judgement, it apperes, that it was allowed by both Courts,  
that a warrantie of charters will give remedy for a ſtate of freehold defeated  
by entrie; and that a warrantie may have a double execution for ſeverall  
eſtates, and that a warrantie of it ſelf reall may be uſed as a covenant to  
recover damages: and by the ſame reaſon, if a man convey lands in fee with  
warrantie, and the tenant bring a *warrantia charta*, and hath judgement *pro loco*  
& *tempore*, and then a ſtranger recovers an eſtate for terme of life, he ſhall ſue an  
execution for recompence for ſuch eſtate; and if he die, and another recover  
another eſtate for life, he ſhall ſue another execution for like recompence, for  
his recompence ſhall be according to his loſſe, as the bookes beſore cited doe  
prove; for he loſeth not the land warranted, but ſome leſſe eſtates out of it, and  
ſo the inheritance of the warrantie remaines ſtill with the inheritance of the  
land. But if once a whole fee ſimple be recovered, and recompence for it, then  
the warrantie is wholly executed and ſatiſſied, and ſo extinct.

This is likewiſe true in caſe of a recovery and voucher proper and *Bona fide*: but  
if the caſe bee for example, that tenant in tail, the remainder or reversion leav a  
fine to mee and my heires with warrantie, and then I ſuffer a recovery to bar the  
remainder and vouch the tenant in taile as I muſt, and ſo the recovery paſſes with  
his ordinary judgements and after a ſtranger ſues mee for the land upon title;  
in that caſe and the like I hold, that I may vouch my conſor againe, for the  
other is known in law, and to the Court to be a ſained recovery, and by conſent,  
and to be but part of the aſſurance of the land between the parties to bind  
the remainder or ſuppoſed remainders: and not in execution of the true intent  
of the warrantie: ſo there are covenants for recoveries with double, or ſingle  
voucher, and ſuch would bee admitted though there were no warrantie at all.

But now of the other point:

If the Osborne vouched in the common recovery ſhall be underſtood another  
Osborne, and not the ſame Osborne, then it muſt be underſtood that Rolle the  
plaintiffe had ſeverall warranties againſt ſeverall perſons, & then when an action  
was brought againſt him, he could not have advantage of both, but muſt hold him-  
ſelfe to one. And therefore 9 H. 5. 12. one brought a *Scir. fac.* upon a fine as heire  
to



to two parceners, the tenant pleaded in barre a fine lebled by the two parceners with warrantie, and relied upon the warrantie, and the plea was holden double; and he forced to relie upon the warrantie onely of one. And so likewise 31 E. 3. Fitz. voucher 25. If one have divers warranties, and they fall by descent upon a person, heire unto them both, yet hee must be vouched onely as heire unto one, and the reason is apparent, (whether you regard the demandant or the vouchee) for as to the demandant it is a kinde of plea in barre, and therefore ought to be single, so the demandant may counter plead the possession, of the vouchee and his ancestors which hee cannot doe if they be divers.

And againe, the vouchor of the tenant against the vouchee, is a kinde of demand or suit, and therefore ought to be single, and the vouchee may counter-plead the lien which he cannot do if they be divers. Hereof it followeth that when he hath his choise of vouchers, and takes him to the one, and thereupon proceeds to judgement he loseth the other and can never resort to it againe, as in case of divers pleas in barre where the actions come to a finall judgement upon one. But if a man have divers warranties for the same lands, he may have severall writs of warrantie of Charters and judgement upon them, and so is Fitz. N. br. 135. l. and that may give him double remedy, or not as the case may be. For if he be after sued for that land in an action wherein hee may vouch but one, then he can never take advantage against the other, because hee did not vouch him according to the former rules. But if he sued in an action wherein he cannot vouch but may require plea, and he doth require plea of them both, and they both advise one plea, and he plead that, and lose, he shall have severall recompence against either, but if they advise severall pleas, he can have no recompence but against him whose plea he followed. But if the land be not recovered against him by action, but by entrie upon an eigne title, then he may have severall executions upon the severall judgements in the writ of warrantie chose against either of them for full recompence, and so he shall have double satisfaction for his loss, for either of them warranted the whole, and neither of them hath colour to paye apd, or make use of the recompence that the other hath paid for his owne ease.

Counten versus Clerke.

Ejectione.  
Surr.  
Hill 10 Jac.  
Rot. 3315.

George Counten the younger, brought an *Ejectione firme* against Thomas Clerke of 31 acres of pasture in Newington, of the devise of George Counten the elder, upon an issue of not guilty, the jury found a speciall verdict, that one William Counten was seised of the said land in fee, and held them with others in soccage, and had issue one John Counten and Elizabeth Counten and that the said Elizabeth tooke to husband one George Dalton, and had issue by him Jane Dalton and Elizabeth Dalton, and died, and that William Counten made his will, and gave thereby unto Jane and Elizabeth Dalton to either of them 10. pounds a peere during their lives, issuing out of certaine lands in Southwarke, called the Woolfack rents, and therein had this clause.

Item, as touching all my lands in Southwarke, and in Newington Lambeth, and Greenwich, whereof I now stand seised, which of right will and my one intent and meaning is, shall descend and come unto John Counten my sonne after my decease, this is my devise. And then appoints that certaine friends of his shall receive the profits of them till his sonne shall come to 24. peeres, and then they to make an account and satisfie him. And then addes this clause, Provided alwaies, that if my sonne John shall happen to decease without issue of his body lawfully begotten, that then I will all and singular my said lands, tenements and hereditaments, and every parcell thereof unto the right heires and posterity of mee and my name for ever, equally to be divided unto and amongst them part and portion like. And that then, and in such case I will and bequeath unto Jane Elizabeth Dalton, and to either of them one Annuity or yearly rent of 5 poundes a peere a peere more, issuing out of the Woolfack rents for terme of their

Devise to the heire or heires of the name of the Devisor must finde a very heire. Of Devises and their intents, at large.

Judgement was in this case given for Clerk, that is for the Grandchildren as heires in default of the will because the Devisors brother could not take by it.

their lives. When the devise dyeth, and John Counden the sonne dyeth with-  
out issue, then the two grand-children, Jane and Elizabeth Dalton enter as  
heires, and make a lease of the lands in question to the defendant Thomas  
Clerke who enters, upon whom George Counden the elder, being brother of  
William Counden the devisee of his name and whole blood entered; and made  
the lease unto the plaintiff who entered, upon whom Clerk the defendant entered.  
And if upon the whole matter the entry of George Counden the elder, upon  
Clerke the defendant was lawfull, then they find for the plaintiffe, if not for  
the defendant.

I will make in this case three questions.

1 Whether the limitation to the heires males, &c. upon the dying of John  
Counden the sonne without issue, shall take effect by way of reversion or re-  
mainder, or else by way of originall or expectant devise. For upon that point  
decided one way, will tell a certain consequence.

2 The next point is, whether the limitation if it were a deed, could carry this  
land to the brother.

3 And the third is, whether it can carry the land to the brother in case of devise  
as this is.

To the first.

And to the first I am of opinion that the sonne is by the words of this will  
made tenant in tail to him and the heires of his body. For the implication  
(which in a will is sufficient for that purpose) is plain. Whereof it will follow that  
the limitation after following to the right heires males, &c. will be but a reversion  
and will tell also in the sonne; for this is a positive rule, That a man cannot  
raise a fee simple to his own right heires by the name of heires as a pur-  
chase, neither by conveyance of land, nor by sale, nor by devise, 28 H. 8. The  
case of the Abbot of Mury, &c. and the Lord Burroughs case 35 H. 8. Dier 34.

Raym. 4. H. 6. If a man devise lands to a person that is next heir and  
his heires, the devise is void, and it works by descent, Mich. 2 & 3. Phil. & Mar.  
Dier 126. What against an heir. The defendant pleaded that he had but the  
third part of 20 Acres by descent, the issue was whether he had the whole, and it  
was found that the obligor his father devised the whole to his wife, until the  
defendant his sonne and heire should come unto the full age of 24 yeares, and  
from thenceforth to him and his heires, and judgement was given for the  
plaintiffe. But it may be so limited unto heires entaile or to one by the name  
of heire single in tails M. 4 & 5. Phil. & Mar. Dier 156. the case of Grefwold.  
He made a feoffment to A. for life, the remainder unto the heires males of the  
body of the feoffor, the remainder to his own heires in fee. The father the  
feoffor had two sonnes, and the elder had a daughter and dyed, and it was  
adjudged for the daughter against the uncle, either because the entail to the  
heires males was void, or because it ceased in the elder sonne. But P. & Eliz.  
Dier 287. Fish led a fine to the use of himselfe in tails and a Fermor brought  
upon it by the issue. And the precedent words touching the descent of the land  
to him changed not the case for these reasons.

Reason 1.

First, it is no express gift averr'd, but a report cumulative, thus  
Touching my land, (which my meaning is shall descend and come to my son)  
this is my will, and so proceeds to dispose it to his friends for a time, and then  
reverts them with the rents, and then disposeth of the inheritance *ut infra*  
not agreeing in appearance with the descent.

Reason 2.

A second reason is, because the declaring that the lands shall descend to his  
sonne, is just the same that the Law speaks, it is utterly void and idle, and then  
the rest of the devise must proceed as if that had not been spoken at all, as  
the cases are before. And I devise that if my sonne dye without issue, then my  
land shall go to my heires males. And therefore the case in 4 H. 6. & 2 & 3.  
Phil. & Mar. Dier 126, before is stronger then this, where it is resolved that  
a devise made to the sonne and heire, and his heires is utterly void, for then  
it is not to the heires collective, but to the person that is heire in fee. And  
though the limitation to the heires males be spoken conditionally by the word,

if John dye without issue, that is an ordinary limitation of a rem. as in a fine *contingat*, yet the rem. or reversion takes place presently.

A third reason is, that that part of the will may take effect in all the words, and yet it may stand as I take it, for the words are, that the land shall descend and come to the sonne, which is in all parts true; for it shall come to him in tail by the devise, and the reversion by descent.

Now if the case shall be taken thus, then clearly if the reversion vested in the sonne in fee, it must of necessity descend from him to the daughters of his sister and not to his uncle.

To the second point when the limitation is made to the heires males or females, whether it be by way of purchase, or by way of descent, they that will take must have both words verified in them, that they must be heires and also males or females. But this hath a divers consideration, and upon divers reasons in case of descent, and in case of purchase, for the word heire is sometimes taken absolutely and as the Grecians call it *ἀπλῶς*; or *simpliciter*; sometime *secundum quid* or *per accidens*: sometimes in abstracto standing naked by itselfe, and of it selfe; and sometimes in concreto clothed with land or rent, in respect of which he may be heire, that is not right heire, as the word is used. For example, the younger sonne in Borough English is heire, and all the sonnes in Gavelkinde, whereof the reason is, because the custome is, and must be pleaded, that the custome of those lands is, that they must descend to the younger sonne or to all the sonnes, so they are heires *secundum quid* of those lands in point of descent, or when they descend, for then they are within the custome that gives the inheritance: *Tum demum scimus cum per causas finium*. But now make the limitation even of land of that nature to heires not in point of descent, and it will be clearly otherwise. And therefore if I give land in Gavelkinde or Borough English to one for life, the remainder to the right heires of I. S. the true heires shall take it, for this is out of the case of custome and must runne to the heire at the Common Law, 37 & 38 H. 8. B. descents 59. & Don. 42.

To the second point

Note also that warranties and esopples doe alwayes descend upon the right heires generall as being to simple heires, 38 E. 3. 22. If there be a warrantor who hath lands in Gavelkinde, the eldest sonne shall be vouched alone, but the tenant may also vouch the others for the possession, 32 E. 3. ff. voucher 94. that the heire generall shall take advantage of such warrantie and no other, except he comes in as vouched by possession with the true heire. Also esopples fall upon the heire at Common law, and also the daughter that comes in by possession *fratris*, shall escape an esoppell of the father 35 H. 6. 31.

Now more if I convey lands that I have on the part of the mother or in Borough English to I. S. and his heires without consideration, the use shall be hold, and so the land shall returne againe to me and to my heires of the mother, or in Borough English as before, for the law doth confirme the use the same in state and quality as the land was. But if I doe declare the use to me and my heires, or upon such leasehold referre a rent to me and my heires it shall goe to my heires at Common law, for it is not within the custome, but it is a new thing devised from the land it self, Tri. 4. & 5. Phil. & Mar. Dier. 163. and that is the reason of another difference, 9 H. 7. 24. Shellies case, that land by descent falling upon one shall be taken from him by a nearer heire after bozne. Not so of these purchases.

So it is in the case of entailles whereof the stat. of Westm. 2. gives examples, which were fee simples conditionall at the Common law, they take their effect by that statute in cases of descent, but where they are not in cases of descent but the limitation is immediately and by way of purchase to the heire male or female of the body, hee must bee as well right heire as male or female of the body that shall take, for this is cleere out of the letter and intent of the stat. of Westm. The cases of 37 H. 8. B. Nofme. 1 and 40. Sir John Huiffey made



made a feoffment to his wife for life, the rem. to his owne heires males of his body, the rem. to his right heires after he was attainted of treason. The wife dies, Sir William Hufley prays an *Ouster le maine*, and Whorewood the Kings Attourney was of opinion, that he should have it, comparing it to an entail in descent, and yet granted that the rem. in fee failed for want of heire, where it is cleare by contrary opinions there, and so in Shelles case without controversie that the fee simple vested in Sir John Hufley, and so was by him forfeited, and that the heire male of the body failed in purchase, and so all came to the King.

And this case is yet more cleare, for here the heires males are not restrained to any body, which might have had some colour of help from the statute of Westminster. But this must be a mere fee simple being without body.

And againe, if it had bene to the heires males of the body of the devisee, (as here it is to the right heires males of the name of the devisee) it could not have served this brother, being collaterall as it might have served an issue male of himselfe if this devise should be taken in nature of a devise to a man and his heires males in which the body shall be understood, as I will shew you after in a case of devise.

To the third  
point,

And to the third point, whether this shall passe by devise, two must passe betweene two maine grounds, but so as two offend neither. One that the devise must be taken according to the intent of the party deviser. The other, that such intent must be so expressed in the Will written, that it may be certaine to the Court, and not against law.

Now we are in case of names and nominations of persons or bodies politique or corporate that may take, whereof there are divers sorts, as first the proper names or surnames wherein notwithstanding there may be ambiguity, as if I devise land to my sonne John, having two of that name, afterment, who was meant shall make this certaine.

There are also more nominations or descriptions as by some dignity, office, or the like, as to devise land to the Earle of Hertford, the Lord Treasurer, or the like, and this will admit a description made good by reputation though not by truth, as land will passe even by consequence to one by the name of some which is a Bastard, or by the name of Wife, which is not lawfull, if they be so reputed, or known by that name, 27 E. 3. 85. A grant by an Abbot without any other name, good, 10. H. 4. 5. So one may take by the name of Sonne or Daughter, if he be so knowne, although there were no marriages between the father and mother, 1 E. 3. 19. 39 E. 3. 24. There are names or designations that have an equivocall amphibologie in them, as *puer* for male or female, and yet if it be no way cleared to the contrary, it will *prima facie* be taken for a sonne, 16 Eliz. Dier 337. make this the like of the word heire, Feast of St. Michael by preeminence of the Archangel, I grant, that if a devise doe sufficiently and certainly shew the intent of the devisee in the substance, though the circumstances fall or be defective, I care not. A devise *Ecclesia Sancti Andree* in Holborne 21 R. 2. F. Devise, 27. a devise unto a College by a name knowne, although it be not by the very name of the corporation, as to Trinity College in Cambridge, it is good, the case of the university of Oxford Co. lib. 10. 57. Now by the Stat. 1 Mar. devises to spirituall corporations enabled M.S. & 9 Eliz. Dier 255. A devise to my sonne after the death of my wife gives an estate to my wife 11 H. 7. 17. & 29. H. 8. B. Devise 48.

If since the statute a man devise that his feoffees shall convey the land to A. and his heires, this is an immediate devise of the land, 29 H. 8. B. Devise 48. *Quere* if the land were never in feoffment.

If I devise lands to one and his heires males without saying of his body, the Law makes it an entail (by the apparent intent) to him and to the heires males of his body, 27. H. 8. 27. by Fitz. and Shely, clearely.

Wherefore I hold the books, 28 H. 6. Fitz. Devise 18. and Babingtons opinion 9 H. 6. fo. 13. to be no law; which are thus, that if a man devise land

land to I. and his heires males, and he have issue a daughter, and that daughter have issue a sonne, that sonne shall inherite by force of that devise as an heire male which cannot be, for it is *oppositum in objecta*, to say, that there should be an entail to heires males of a body (as clearly it is) and yet that an issue by a female should inherit, for that were to make it a fee-simple, and where shall the land rest in the meane time, while the mother lives, and before the sonne is borne? and what warrant is there, when the deviser speaks sensibly and certainly, to enlarge his gift for ought appeareth beyond his meaning, which is as great an injury as to abridge his meaning. I would rather grant, that if a man devise land to J. S. for life, the rem: to the next heire male of I. D. and die I. D. having issue a daughter who had issue a sonne, and then the daughter of I. D. die and then I. D. himself die, and then the tenant for life die, that the issue of I. D. shall have the land.

The case 30 aff. 47. & 30 E. 3. 27. where one having two sonnes and a daughter, devised it to a stranger for life, the rem. *propinquioribus de sanguine* per. of the deviser and died, his sonnes having no children, but his daughter having two daughters, and it is holden that neither the sonnes nor the daughter can take, for they are *pueri*, and not *de sanguine puerorum*, but the two daughters of the daughter shall take for their lives, and if there were also sonnes of sonnes, or daughters, they should all take together. And that children borne after the rem. vested (which was after the Testator) should take nothing, and that the nearest of degree in blood should take, and not the worthiest in order of descent; for the words here doe import no respect of dignity, but of proximity of blood. But a devise made in rem. to a corporation where there is no such, is void, though there be such a corporation made before the rem. tail. 9 H. 6. 23. & 49 E. 3. otherwise if the corporation be begun, but no head yet chose, 4 Ed. 39.

See by Kible 2 H. 7. 13. If I devise lands in rem. to the heires of I. S. it is void if there be no such I. S. though there be one, and heires of him before the rem: fail, 19 H. 8. 8. If I devise land to the Abbot of S. Peter where it is S. Paul, the devise is void. 9 H. 6. 23. 11 H. 6. 12. Farrington and Daynes case, one seized of land devised it to A. for life, the rem. unto B. in tail, the remainder unto the next heire male of the deviser, and the heires males of his body the deviser dieth B. dieth without issue the next heire of the deviser was a daughter. The cleare opinion of the case is, that the daughter shall have the land by way of reversion, and though she have a sonne after, he shall not take away the land. Chapmans case, if land be devised to a stock or family or house it shall be understood of the heire and principall of the house, much more where the proper word of heire is expressed; where the case is doubtful the law shall prevaile, as Mich. 15 & 16 Eliz. Dier. 326. One wholly having land, deviseth the same for yeeres, rendering a rent, and after having a sonne and a daughter, deviseth the reversion to them, and to the heires of their bodies, and for default of issue of the brother and sister, the rem. to the right heires of the deviser, the brother dies without issue, the sister hath issue and dies. It was adjudged that the moiety of the reversion and rent should returne to the heire of the deviser, yet the implication may be so expresse, that it shall change the law, as Mich. 13 & 14 Eliz. Dier. 303. One having lands, willed that a third part shall goe to his eldest sonne, and the other two parts to foure younger sonnes, and the heires males of their bodies. And if a child be borne, he shall be heire, and if all the five happen to die without issue male of their or any of their bodies, then he willed that the other two parts should revert to the heires of the deviser. All the sonnes but one die; The opinion was, that the survivor had an estate tail in all the five parts, and nothing should revert as yet.

\* Also Hil. 5. Eliz. Dier 220. One having land, part in fee simple, and part in fee tail, reciting by his Will that his wife was dowable of the third part of all his lands deviseth unto her the third part of all his lands yet she shall have

\* No man shall shew me a case in law, where by purchase by Devise to an heir any may take that is not heire indeed without declaration pfaime.

but the third part of his fees simple: But if it had been, I give unto her so much of my lands as shall amount unto a full third part of all my lands, it had been otherwise; so here, I grant, that though this devise will carry it but to the very heire, because no other sense appears to the Court, yet if I say by my Will, I make I. S. my heire, and I give unto my said heire my land, and indeed he is not so much as of my blood, or (as it is here) I give to my heire male which is my brother, George Counden; or if a man have an house or land in Borough English, and buy land lying within it, and then by his Will gives his new purchased lands to his heire of his house and land in Borough English, for the more commodious use of it, it will be otherwise, for here is *heres factitius* or *factus not natus* or *legitimus*: to the intent is certain, and not conjecturall.

And that is the reason of the case of 7 E. 6. where land is devised to three brethren in tail, and that one should be heire to the other, this makes cross remainders.

Now the clause that the land shall be to the heires males part and part like, makes it yet more repugnant and insensible; for if the heire be preferred, that should be in an intail, and then none can part with him. And if he meant that all that were males of the name and posterity should take together, then the word heire is wiped out, and then the sonnes shall take equally with their father like the case of 30. Ass. (before) of *proximioribus de sanguine*, and therefore since the will is insensible, repugnant in it selfe, and of no certainty, it shall be voyd in law.

Lastly, Ashenhursts case is even the same, judged in the Kings Bench, Term. sancti Mich. Anno Jac. Reg. 7. Rot. 115. which was thus; William Beard seised in Fee of a messuage called Beard-Hall with the Appurtenances in Beard in com. Derby held in soccage, having issue three daughters Elizabeth, Emme, and Katherine, devised the same after his decease to Emme his wife for Terme of her life, and after her decease that his executors should receive the profits thereof, untill the full summe of nine hundred pounds was received, for the preferment of his daughters in marriage order and above all Charges, and after the nine hundred pound levied, the said messuage should remaine to his right heires males for ever. And if his heires males should disturb his executors in receiving the profits, that then their estates should cease, and the land should be divided amongst the daughters then living, and dyed; One William Beard was found his heire male, Emme his wife entred and dyed, Elizabeth his daughter after his decease, married Ralph Ashenhurst the defendant & had issue Randolph Ashenhurst. And Francis Curtis, the plaintiffe, by a lease from William Beard the heire male, brought his Action of *Ejectione firme* against Ralph Ashenhurst, whereupon the speciall verdict was found *ut supra*. And concluded that if William Beard took estate by the will in rem. then *pro Quer.* otherwise *pro defend.* And upon argument, the Judges gave judgement against the plaintiffe.

But note, that upon that judgement, a writ of error was brought in the Exchequer Chamber; And this judgement of Coundens, being thus urged to maintain the other, there was much labour to make differences, but in the end Pasche 17. Jac. the judgement was affirmed.

### Elias Tisdale versus Sir William Effex.

Elias Tisdale brought an Action of Covenant, against Sir William Effex a Baronet, and declared that it was agreed between them, by a Bill of Articles indented, in manner and forme following. First, the said Sir William Effex *convenit, promisit & agreevit ad & cum prefato Elia, quod ipse idem Elias haberet, occuparet & gauderet* certaine lands for seven yeares from the feast of the Annuntiation next ensuing the date of the bill, and covenanted, that he should quietly remove such buildings, as he should set up at any time, within three

Will un-  
sensible or re-  
pugnant is  
voyd.

Derby  
Ashenhurst et  
Curtis

Judgement.

Covenant.





## Harrington versus Deane.

Termis S. Hill. An. 10 Jac. Reg. Rot. 3230.

Accomp.  
Goldsborough  
London.  
Accomp.  
Receipt  
By whose  
hands, and  
to whose use.

THomas Harrington brought an action of accompt against John Deane, to render him an accompt of two hundred pound of money received by the hand of Sir John Rotheram Knight, &c. The defendant pleaded that he was never his receiver of any such summe or any part thereof, by the hands of the said Sir John Rotheram.

The Jury find that the said Sir John Rotheram was indebted unto Harrington in two hundred pound, and that Harrington willed Deane to require and receive the money of Rotheram for him, whereupon Rotheram payed Deane to borrow two hundred pounds for him of any body and to pay it over from him unto Harrington, and he accordingly borrowed two hundred pound, of one Spicris Stanhop for Rotheram, and received it of her to pay over unto Harrington, and he appointed his wife accordingly to pay it over unto Harrington, and Rotheram gave bond to Spicris Stanhop for it. And it upon the whole matter &c. And it was adjudged *una voce*, that the Action was well brought, and that the verdict did maintaine it, in so far as it was laid, for it appears plainly from the beginning to the end of the case, that Deane the defendant was made and took upon him to be servant as well to Harrington, to aske and receive two hundred pounds as to Rotheram, to borrow where he could, two hundred pounds, and that not onely to the intent, to pay it over unto Harrington, but with an expresse Commission to pay it over indeed. Both which Commissions he did accordingly execute in all the parts, so that though it appears not that Spicris Stanhop lent the money, to be paid over unto Harrington, yet it is found that Deane received it, as lent to Rotheram, whereby it became Rotherams money, the rather when he gave bond for it; And that the same receipt, was to pay over unto Harrington, by force of the first Commission received from Rotheram, and the intention of Deane himselfe.

So as in the same instant it became first Rotherams money, and by him as it were delivered over unto Deane to be paid unto Harrington for his debt, (though it never came to Rotherams owne hand actually) And so it became Harringtons money received by the hands of Rotheram, according to the Declaration.

And though the books of 1 E. 5. and other books be, that if A. deliver money over to B. to deliver and pay over to C. that in this case B. is answerable to two actions of accompt conditionally as the books are, yet in this case to Rotheram could never have had an action of accompt against Deane for his money, because he had put himselfe out of the property of it, by appointing Deane to pay it over unto Harrington for his debt, and Harrington had accepted it, and made it his satisfaction by appointing Deane to receive it by the hands of Rotheram; and Deane had received it to that intent, and in execution of all parts of that agreement, and so all parties were bound by it.

## Drury versus Kent. Q. Imped.

Prohibition  
of waste in a  
Quare imped.  
by the plaintiffe.

Drury brought a *Quare Imped.* against Kent the Incumbent and others; and upon intresse made to the Court, that Kent did sell timber upon the glebe, and upon the lands of copyholders holding of a manor parcell of the Rectory, the Court granted a Prohibition.

Pine against the Countesse of Leicester. Debt.

**H**ugh Pine of Lincolns Inne brought an Action of debt in the County of Leicester against the Countesse of Leicester, and declares that the Earle of Leicester being seised in fee of the Manor of Cleobury in the County of Salop, granted a rent charge of 100 pounds per annum out of the Manor, and one Foster and his Wife for their lives, and then layes the death of the Lord of Leicester, and how the Manor came to my Lady, and then the death of Foster and his Wife last: And now he as executor, to Foster and his Wife brought this action for arerages of rent incurred in their life, while the Manor was in the hands of the Lady, and this action being laid in a County where it was supposed Pine was strong; it was moved to be laid in more indifferent shire: whereupon I said that they were not well advised in this kinde of action of debt was locall, and must needs be laid where the land was, because the Lady was not chargeable, but in respect of the action, whereupon Serjeant Harris being not of Councell in this case moved it had bene so adjudged in another case.

Cumberland versus Cumberland.

**T**he Earle of Cumberland brought an action of waste against the Countesse of Cumberland delinquer, and layd the waste in the writ among other things in the Castle of Burgham (but did no otherwile assigne any Towne in the Castle stood) and other wastes in the Townes of Buream, Flaxbridge, Appleby, & then in his declaration assigned waste in the places and Townes contained in the writ, and one other Towne called Langton not contained in the writ, whereupon 18 severall issues were joyned, whereof one was concerning the reparation of the castle of Burgham, and none concerning any thing else. And there was one *ven. fac.* for the trial of all these issues which arose from the Townes of Buream, Appleby and Flaxbridge, whereupon the trial of all these issues, whereof 14 were found for the Countesse, and 4 for the Earle, and motion made in arrest of judgement for misdirection by the Councell of the defendant. It was resolved by the Court though they were severall issues and might be tried by severall *ven. fac.* and then every *ven. fac.* was come from the place where the particular issue did arise, yet in such cases this one *ven. fac.* was allowed to trie them all for avoiding of multiplicity, but then that *ven. fac.* must arise from all the places from whence all issues do arise, and from no more, as a common *ven. fac.* for one issue ought to be. Now here the *ven. fac.* offended in both these, for the *ven. fac.* did not comprehend *de vicineto Castri de Burgham*, for a Castle will beare a *ven. fac.* from the Towne of Buream, as if it must be understood to be in the Towne which is not so, though a Parish Church shall be intended within the Parish. The other fault was, that the *ven. fac.* was awarded from one Towne inter alia from whence no issue did arise, which also was not allowable: whereunto the plaintifes Councell gave these answers, that this *ven. fac.* though it were before in *facto*, yet in the law and effect it was as severall, and then it might be void and voided for one issue, and yet stand good for other issues wherein the faults were not. And the rather as this case was, because these faults of the *ven. fac.* were concerning these issues onely that were found for the defendant, and the should not be received to assigne fault or error in that made in her. Whereunto it was answered by the Court that the *ven. fac.* being void indeed, could not be made good in part, and void in part, and especially where a Towne was added to the *ven. facias*, which could not be applied more to one issue then to another, and therefore was vicious to all, and being the fault of the Court, was to be disallowed to them *ex officio*, though the defendant said nothing.



Variance be-  
tweene the  
writ originall  
and the Decla-  
ration.

The other fault was that the assigning of waite in the declaration in a Tolone not mentioned in the writ was a variance from the originall and a fault incurable to the whole writ, and the fault in the declaration remains and is to be pleaded in abatement of the writ, whereupon judgement was given *ad cessare Bre.* and the plaintiffe resolved to take a new writ and begin againe.

### Cope versus Lewyn. Assumpsit.

Tr. 12 Jac. Rot.  
1704.  
Letters of  
administration  
not produced.

Cope brought an Assumpsit against Lewyn, and declared upon a promise made to the intestate, and then layeth the death of the intestate, and that the administration of the goods was committed to him by the Bishop, &c. All well, saying that he did not say that he produced his letters of administration in Court: upon issue *non assumpsit* it was found for the plaintiffe, and upon motion of Hutton in arrest of judgement, the Court was of opinion that the plaintiffe could not have judgement, for it is of the substance of the action that he be a sufficient Adm. and though he hath pleaded it so, yet he must shew it to the Court, that it may appeare to them that it is as he hath pleaded, as upon a plea upon a deed, the deed must be shewed in Court. And the defendant may deny the committing of the administration, notwithstanding that he hath letters. Yet Serjeant Harris produced a prebent out of the Kings Bench, Tr. 12 Jac. where one Barret brought an action upon the case against one Winchcombe Sheriffe of Oxfordshire, and declared that whereupon execution of debt brought by him as executor to one Lancelot Barret against one Long the defendant, the defendant had him in custody upon a *capias in legem*, and forced him to escape, notwithstanding the exception to it, judgement was given for the plaintiffe. But that case differs from the former, for the escape was a wrong done to the executor himselfe, though it be true that the damage to be recovered shall be shewed in his hands; for so shall they be in all such trespases, and also the producing of his letters in his first action is materiall.

Execu. brings  
action of e-  
scape not shew-  
ing the Testa-  
ment.

### John Ion's Case.

Court of War.

Out of the Court of Wards came this case unto us.

Lincoln.  
Repugnancy in  
office makes it  
voyd.

When a *Mandamus* after the death of John Ion it was found that *de obitu suo* he was seised in *Dem. sua de feodo* of the Spanno, called Sotrons Spanno, in Barrow. And that he being so seised *posse seiscire* 10 Martii Eliz. did therof infeoffe one Winchcombe to the use of himselfe for life the rem. to Welcome in fee, and then continues *quod postea* John *fuit sic de omnibus dictis premissis modo & forma supradictis seiscire existens de iure statum suo de eisdem obitu sic inde seiscire* 12 Martii 8 Jac. And my Lord Chief Baron and I ruled this office to be voyd for the repugnancy of the finding of the estate whereof he died seised, and so ordered a new office to be found.

### Dawtries Case. Wards.

Melins inqui-  
red. not shew-  
ing the war-  
rant of the first  
office.

Another case was this. An office was found by Commissioners after the death of William Dawtry Chamberlaine at Chichester, whereupon a *Melins Inquirend.* went forth and rectified, but thus *Cum per quandam inquisi- nem captam apud Chichester compertum existit*, &c. And doth not say that it was either by commission or writ, or before whom, whereupon was held it voyd, and the office that was taken upon the *Melins Inquirend.* For by the *Melins* it must appeare, that the first office was by warrant. But if it had been *Per litteras commissionis*, or *de mandato nostro*, which is understood by writ, it would have been good enough, although it had not bene said before whom, for so the *Prædicti* are usuall.

Cowper

Cowper versus Andrewes.

Prohibition.

O Kenden Cowper brings a Prohibition against Roger Andrewes, Vicar of Cowfield, that whereas Thomas Lord de la Ware was heretofore seised in fee of an 140. acres of land in Cowfield, late parcell of an antient Parke called Ewhurst Parke, lately impaled and replenished with Deere, and so seised, and all those whose estate he had in the same 140. acres, and all the farmers and Occupiers thereof have used time out of mind, to pay to the Vicar of Cowfield for the time being two shillings a yeere, and one shoulder of every third Deere that within the same Parke should be killed, in full satisfaction of all tythes remanuing upon the same 148 acres, with the Vicars who alwayes accepted in discharge of all tythes; And then deducteth doone the 140. acres to himselfe, and then shewes, that though he tendred the two shillings by the yeere in such yeeres and though in the same there were no Deere killed, yet the defendant refused to receive the same two shillings before mentioned to be tendred, and sues him for tythes in kind for those yeeres.

Mich. 10. Jac.  
Rot. 1123.  
Suffex.

Modus deciman-  
di for a Park,  
two shillings a  
yeere, and a  
shoulder of e-  
very third Deer  
killed in the  
Parke which is  
now disparked.

The defendant by protestation denying the prescription for plea, saith, that the Parke long before the time of the subtraction of the tythes aforesaid, was disparked, and the Deere in the same being utterly destroyed and killed by the Occupiers and possessors of the said Parke, and all the lands lying with-  
in the said Parke, were converted into arable land and pasture, and so remaine;  
and because the said plaintiffe after the disparking of the Parke would not pay tythes for the cattle and cozne, &c. therefore he sued him, whereupon the plaintiffe demurred in Law.

The first great point is :

If a Parke have bene so time out of mind, and a certaine summe of money be likewise bene paid time out of minde for all tythes of it, and then the Parke be laid open, and all the Deere destroyed by the owner; and further, by judgement in a Quo warranto, the Parke soe judged. and the liberties of Parke released. The question is, whether now the forme of tything be required, and the tyth in kinde may be required as of other land, because now there is no Parke, neither *de jure* nor *de facto*.

The second great point :

Again as this case is, if the prescription have been to pay money and some part of every third Deere killed in that ground, then if the Parke be totally disparked as before, by the owner, and by judgement of the Law; When whether the prescription be ceased and the tythes demandable in kind from thenceforth.

As to the first point, I hold that the forme of tything remaines, though the liberty of Parke, and so the legall Parke be lost, for it is the land whereof the Parke consists, that is to yeeld tythe or any thing in lieu of it, and the Parke as it is but a liberty is a thing incorporeall and an imaginary priviledge concerning that land, and can yeeld no profit to the owner, and therefore no tenth of the profit to the Parson.

To the first  
point.

And therefore in his prescription, he might have laid it in the land, and might have omitted the name of Parke; for if the Parke were enlarged or enlarged, prescription holds for the old ground.

And in this point Lutterals case is to all purposes more strong then this case; yet I grant that if a man have common of estovers to his house, and suffer his house to fall downe, he can now claime no estovers; and if he sue for it, and the other plead that his house is downe, he shall not have judgement with a writ of execution, till he have reedified his house, as in a Warrantia Charta, or a writ of Speine where the defendant pleads that, he is not sued nor distrained, he shall have judgement, but no execution for the present.

Suit for esto-  
vers when the  
house is down.

Also note, that  
the defendan-  
may plead in  
this case of as-  
sise of estovers,  
nisi totum  
dissein.

So in a writ of Dower against the heire, if he plead that the demandant retaines the evidence, he shall have judgement presently with a Cesset execution.

But

Quere.

As to the second point.

1. Branch.

2. Branch.

The first branch of the second point.

But in the case of estovers, the plaintife shall be barred, for at the time of the action brought he hath no right of estovers, but it is in suspense, and there, for it is not a perpetuall, but a temporall barre, and if he reedifie his house in the same place, he shall have his estovers againe. And so I thinke if he had pulled downe his house and built it againe. *Tamen quare*, if he bring an assize, or *Quare permittat* for his estovers where his house is downe, and judgement passed against him; if he shall not be barred finally, rather then where time in talle in a *Forcedon* is barred by warrantie and assets and then aliens the assets against his issues, yet the barre stands, which should not but for the judgement.

Upon the second point two severall branches are, considerable besides the first point before spoken of.

First, if that part of the manner of tything by the venison be not so arbitrary and at the choise of the owner of the Parke, that if there be no Deere killed, that the Parson cannot complaine, but must content himselfe with the two shillings.

Againe, though the venison cannot be had in kind out of that ground, yet whether the Parson may not have recompence for it by suit in the Ecclesiasticall Court according to a valuation, as it was *communibus annis*, when the Parke stood.

As to the first branch of this point, I shall proceed by degrees.

First, if all the Deere should die of some disease, I am of opinion, that the owner were not bound to replenish it to support his forme of tything, no more than the lessee to repaire his house destroyed with tempest.

Also the owner may kill two Deeres yearely, and pay no shoulder; and I am of opinion, that the custome were as good if it were to pay a shoulder of the twentieth Deere yearely, and then he might kill nineteene without paying any tythe venison.

So then the question must rest meerey upon the willfull default of the owners disparting, whereupon it is to be marked, that the two shillings a yeere is certaine and sufficient of it selfe to have made a *Modus decimandi* without the help of the casuall venison, so as it cannot fall into a *Non decimando* for want of the venison.

But if all had bene casuall and failed, it had bene doubtfull, not onely because of the failing, but because of the originall weaknesse of such a composition of *Modus decimandi*; for since the tythe in kinde is an inheritance certaine, it is against nature that it should be extinguished by a recompence that is not as perdurable, though not so valuable as it selfe, like the very case of an exchange, and upon the reasons of Vernons case Co. lib. 4. where it is resolved, that a jointure made to a woman, must be for her owne life, and not the life of another. But suppose that there were an antient composition, that the Parson should have the third part of the profits of a Court of a Manor for his tythes, and then the tenancies should escheat, so as the Court were dissolved, whether the tythe should revive.

And now, to the case in question, the composition in the creation did carry in it recompence upon the tythe, part certaine, that is, two shillings a yeere; and part uncertaine, casuall and visibly, depending upon the will of the owner of the land; as if the Parson had said in the beginning (for now you must imagine the forme of the agreement or composition by consent of the Patron and Ordinary, as the prescription layes it) I will take for my tythes of my ground two shillings a yeere, and if you kill any Deere in it you shall give me of every third Deere a shoulder; for *Modus & conventio faciunt legem*, 19 H. 6. 36. I. S. granted to J. N. common in his land, *quandocunque veria suaverim*; if he employ the land to till, or let it lie fresh the grantee hath no remedy. And so is the booke 17 E. 3. 26. Now, suppose that such a Common were granted for composition of tythe, 31 E. 3. Fitz. annuity 28. A. grants an annuity to B. till he shall be promoted to a Benefice *quod duxerit acceptand.* Creation is given to him,



him, and therefore he may refuse for ever, 6 E. 6. Dier. 70. If a man grant the office of a keeper of his Parke, yet he may disparke. So, if he grant the Stewardship of his Courts, he may release his rents and services. If I were bound in an parke, yet I may disparke it. So these are not within the rule. That a man should not by his owne act defeat or frustrate his owne grant, but it is to use the liberty that I reserved to my selfe upon my grant standing with the grant, which was at the first made arbitrary. And therefore is not like the case of Davenport, Co. lib. 8. 144. where the words there are no more then the law spake, and therefore were void. But it would have bene otherwise if the case had bene thus. If the Vicarage fall void whilest the Parsonage shall remaine in his hand unaliened; and the like I say of 6 E. 3. 54. in the case of Theobald.

A second reason is, that the composition is on both sides executed, fixed, and gated, so that though the Parson cannot enjoy his *Modus Decimandi*, yet he cannot resort to the tithes in kinde, the rather as this case is, where a part, that is to say, two fillings, is still due and payable, so as it is not fallen into a *Non Decimando*.

Wherein first to remove that, that blears the eyes, which is, that because the title is supposed to be given originally for this recompence of money and Rent: And therefore if the recompence be detained, the title must revive. And it is compared to annuities granted *Pro consilio impendendo*, that for default of counsell the annuity ceaseth. And so of some other cases which have been put, whereof I will make mention in particular, and therefore I must begin with the consideration of the nature and operation of a grant of one thing for another.

Whereupon I lay this ground. That regularly this word (*Pro*) or in consideration doth not impose a condition or make the grant defeasible, though the thing taken in lieu be either taken away by the giver wrongfully, or by any other person upon a just title; so as the thing given be wholly lost. And therefore if I. S. give W. Acre to I. N. for B. Acre, and so *converso*, without the word of exchange, it will be not defeasible, nay more if they use the proper word of exchange, and that be executed; a wrongfull entry of either party will doe no hurt, but a rightfull eviction will. But without the proper word of exchange, though perhaps it were meant in the nature of an exchange, it will not defeat.

But it is true that the word (*pro*) in some cases hath the force of a condition, when the thing granted is executory, and the consideration of a grant is a service or some other like thing, for which there is no remedy but the stopping of the thing granted, as in the case of Annuity granted for counsell or for doing the office of a Steward of a Court; or the service of a Captaine, or Keeper of a Fort. Vghreds case Co. 7 lib. And in those cases the condition is not precedent, and therefore needs not to be averred performed when the Annuity is demanded: and these cases are within the reason of an exchange, where the land given is evicted, for here the failure of counsell or service is a kinde of eviction of that that is to be done, for the Annuity, in as much as he hath no means else to exact the counsell or recompence for it, but to stoppe the Annuity.

And it is to be noted, that this hath so farre the force of a condition, that it being denied once it doth aboide the Annuity, not for that one payment but forever, which is to be noted for use, after in the principall case, 5 H. 7. 10. I covenant with I. S. to give him 10 pounds to serve me a yeare, in his action for his money hee must count for his service done, and so it seemes, though he had covenanted *converso*, to serve me, for though in that case I might have an action for the service, yet it is not as of an estate vested of land of inheritance, as the case is here.

In another case it works by condition precedent, as in all personall contracts, as I sell you my horse for 10 pounds, you shall not take my horse except you pay me 10 pounds, 18 E. 4. 5. & 14 H. 8. 22. except. I doe expressly give you day,

Reason 2.

Parol (pro)  
Calthrops case  
the 16 of Eliz.  
D. 335

Vghreds case  
Co. lib. 7. condition subseq.  
15 H. 7. 1. Annuity granted

to have a sewer through my lands 9 & 15 E. 4. 5. 8.

one granted a wardship for good service to be done by the grantee for certaine time, he faileth of service and loseth the wardship.

This booke is plain so and put in issue without doubting whether the grant were simple or conditionall, yet note the wardship is not a thing executory, but the service is a thing for which there is no remedy.

day, and yet in this case you may let your horse go, and have an action of debt for your money; and so may the Taylor retaine the garment till he be paid for the making, by a condition in law.

So if I retaine one to serbe me a yeare for 10 pounds, he cannot demand the 10 pounds but he must averse he hath served mee out the yeare. And 32 E. 1. ff. avowry 245. an Avowry was made for not repairing a Parke pale: new, the tenant answered that his tenure was to repaire for the old pale. And Carsby 15 E. 4. 4. puts it of a grant to make a new pale for the old, and holden in both cases, that if the old pale be withholden, he needs not to make a new, for here is no remedy for the old pale, and perhaps neither in case of tenure nor of grant; in this case the detaining of the old pale will discharge more then for that one time, for in that case the old is allowed towards, or for the new pale per vices; not so in the annuity granted *pro consilio*, which is totally for counsell, and therefore will extinguishe wholly. And the case 9 E. 4. fo. 20. & 15 E. 4. fo. 4. is full in this point; for there was a composition betwene the Abbot of Sempringham and the spasser of Burton-Lazer, whereupon the spasser granted that the Abbot should have certaine tithes without contradiction; and the Abbot granted him forty shillings a yeare out of the house for the same. And the opinion was, that though the spasser take away the tithes, yet the Abbot must pay the rents, for both parts are executed and either party hath remedy for the wrongfull detaining; But Needham saies that if the rent had been granted *pro decimis habendis absque calumnia*, it would have been otherwile perhaps. Grayes case, Co. lib. 5. fo. 78. is full to this. If one had a common in my ground time out of minde, and hath paid me for it Hens and eggs, yet this is not entire, that he need declare of both parts, because it is no condition, and consequently, though he refuse to pay the eggs, yet he should hold the common. But if it were conditionall, as in the case of Potwater there paying, or to pay, because in that case there is no remedy as in the former by distress, will be taken conditionally.

Another reason that the tithe in kinde cannot be restored is, because the tithe in kind is actually discharged and extinct, for now that which of common right should have beene the tithe, is made of the same nature with all the rest of the fruits lay see, so as if the owner should through ignorance of his case set out a tenth, yet if the Parson should take it, the owner might bring an action of trespass as for any other part of the fruits, and if the parson sue for tithes in kinde the owner shall have a Prohibition for drawing his lay see *ad aliud examen*.

On the other side, that that was given in lieu of tithe is become part of the inheritance of the Parson, and part of his spirituall see, for which he shall have remedy in the Ecclesiasticall Court. So in the case of the Bishop of Winchester Co. lib. 2. fo. 45. where the land of the Bishop being discharged of tithes was discharged in the hands of lay Farmers as meere lay see, and the Bishop could not demand tithe of his Farmers, for there is no tithe for all his lay see.

And so also the case of Pigot and Herne there, where it is prescribed, that the Lord of a Manor had used to pay time out of minde a pension to the Parson for tithes of his Manor and tenements, and had the tithes of it for it, and he sues for those tithes in the spirituall Court, for it was in stead of the true and spirituall tithes, though in lay land, otherwise here where it is discharged.

And 8 E. 4. 13. F. N. B. 41. G. & 43. K. a Prohibition upon prescription upon discharge of tithes for lands given to the Parson, and if the Parson alien the land with consent of Patron and Ordinary, or suffer a recovery wherein aid is praid of them as Fitz. N. 48. b. is. I am of opinion, that as his successor can have no *iuris utrum*, so he cannot resort to his tithe.

And the Reg. fo. 38. upon discharge of tithe by Parson, Patron, and Ordinary, for land given unto the Parson and his successors runs thus. *Et quia discussio huiusmodi donationis & concessionis de laico feodo in curia nostra & non alibi tractari debet, vobis prohibemus, &c. ne placitum aliquod laicum feodum tangant.* &c. *Alto*

It is true that an appropriation at the common law might be made presentable, for that was spirituall still while it was appropriate, but so is not this F. N. br. fo. 35. & Grindons case Plo. Comm.

The case 18. Eliz. Dy. 389. where it is adjudged that *modus decimandi* of wooll and lambe doth discharge the naturall tithe of graine and hay.

Also the writ counts as well the grant of the land as the grant of tithes, without the Parson, Patron, and Ordinary, which have absolute power, or were obliged, yet the discharge must stand for the reasons before mentioned. And because there is nothing in the prescription that imports a condition, but rather only a consideration which is the mere difference whereupon Grays case Coke lib. 5. fo. 78. stands. Now there is nothing in this case that can import absolute dissolution of the composition. For as it is said, there is nothing to be done but the Parke, or ground may answer tithe hereafter. And to say that tithe in kinde may be required in the meane time is absurd, both because as I observed it be a condition it must destroy the whole estate; and also because as I observed it be an inheritance in *Modus Decimandi*, and at the same time tithe in kinde *contra modum Decimandi*. And if it be a reason sufficient in this case to demand tithes in kinde, because the *Modus* is defrauded, by the same reason every will denyall of a *Modus* will give the like advantage, whereas though it be allowed, but onely the prescription it selfe *de modo*, because that the denyall will not alter the right, but you may and must sue for it as in other wrongs. And though for the time that there are no Deere in the Parke, there can be no denyall according to the *Modus Decimandi*, yet the Parke may be replenished at any time, and therefore there can be no extinguishment of the *Modus*, and both tithes cannot stand together, the *Modus Decimandi* of the inheritance, as being extinct, and the tithe in kinde as it were *hac vice*. The last great question is, whether the Vicar in this case can have any remedy for the losse he sustaines, in that he hath not the shoulders, nor cannot recompence for that which is not. Wherein the doubt consists in this, how he can have recompence for that which is not. I answer, that wheresoever I suffer an injury joyned with a losse, the law will give me a remedy and recompence according to my certaine or uncertaine losse, pea & sometime where the thing is not in being, but utterly extinguished. If the case here were, that he should have yearly two Deere out of the same Parke, the disparking would not hurt, for he should have the value ever & so likewise where he sets not out his tithes nor payes not the *Modus*, for *nummus est proventus*, as the law & measure of all things, for no man ever doubted that the non-payment of the *Modus* restored the tithe in kinde, though it be alleaged of some that he was ready. And therefore if a man have common of estovers in my woods, so many loads by the yeare certaine, or else uncertaine, as much as he shall spend in fires and in repairs of his house; if I stub up this wood, so as there neither will be any wood againe, yet he shall have an assize from yeare to yeare of his common of estovers, whereof these consequents follow; First, that the inheritance of the common of estovers doth remaine not withstanding that there be no estovers, for else he could not have an assize: wherein he must declare of his inheritance or freehold at least by grant, or by prescription. Next he shall recover a selsin of those estovers which are not in being, whereof he is supposed to be disseised, and also damages, not according to that that it now is, but according to that value that it yielded *communibus annis*, though it were uncertaine. So in Maryes case, Coke lib. 9. fo. 111. If any man feed in common wrongfully, every commoner may have an action of the case against him, and by the same reason if the Lord of the soyle plough it up or make a water course, and yet at this time there was no profit of common at all and the possibility of restoring of it lesse then is in this case, and therefore there can be no recovery of the very tithe which must be for the inheritance or not at all. Touching the uncertainty: if a man grant an Advouson with warranty, and the tenant in a writ of right of Advouson vouch, he shall have (if he lose) the Advouson it selfe is utterly of an uncertaine value. So of a liberty *bona & catalla solum*, value. 11. & c. & Bracton:

\* The last great question.

Remedy in law for a thing not in esse, much more reasonable to have damage for it, then the thing it selfe adjudged as in the assize of estovers.

There the uncertainty together with the nullity of the thing payable must make the difference, which also is nothing.

Fitz. Na. Br. 38. I.

As there is no tenant in tale without possibility of issue as long as the persons life be they never so old, so as long as there is possibility of wood, much more here possibility of Deer

\* An advouson descended may be put in value for land recovered upon warranty 9 H. 6. 56.

And for an Advouson recovered in a writ of right of advouson upon voucher, one may have land in value for recompence. 3 E. 2. F. Rec. in value 9. 8 E. 2. F. Rec. in value. 11.

& c. & Bracton:



&c. which may be valued by an estimate *Communibus annis*; if I let my *bona & catalla* or profits of Court rendering rent, it is no plea in debt for my rent; that he had no profits that yeare; but if the lessor discharge or release all, otherwise it may be, but here is no perpetuall discharge.

But the very case seemes to be P. 18 Eliz. Dier. 340. where the case is, that the manner of Ellington, whereof an Abbot was seised at the time of the dissolution lying within the parish of Pykerke, and used to pay onely tithe wooll and Lamb time out of minde, and now the land being used to meadows, and tillage, the Parson demands the tenth of hey and corne, and by the opinion of the Justices and Clerkes of the Kings Bench, Prohibitions be usuall in such cases by force of the word [discharged] in the Stat. 31 H. 8. For *Modus decimandi* discharge all other manner of tithings, *quod nota* for the use before, that where there is a *Modus decimandi*, the tithe in kinde is utterly extinct and discharged; and so note, that if a man have a manner of tithing of land arising upon the ground, and he turne his ground to another use, it shall neither fall to a non decimation, nor to a restitution of the tithe in kinde, but to an allowance by estimate of the ordinary profit that the forme of tithing was wont to yeeld. But *Quere*, whether that case shall not be holpen by force of the Statute 31 H. 8. by which also unity of possession is holden a discharge of payment of tithe, though no discharge in right. And although it may be true, that in that case the land lay alway to wooll and Lamb, so as there could be no other, but it was indeed the tithe in kinde, and so not prescriptible, yet when the prescription is beyond memory, it may well stand that it was so, when the land was employed to corne, for the contrary appears not. And againe, if the owner had not used to pay time out of mind the just tenth of the wooll and Lamb, but a lesser proportion, so as it were truly a *Modus decimandi* of a speciall commodity, if the land be turned to other use, as of graine or of hey, the forme of tithing cannot change, except you will say, that he shall pay such a proportion of the fruits it now yeelds, as it did of the other; so the *Modus* should be in the proportion, not in the kinde of profit; yet that will not serve as the case may be: as if there be such a proportion of Lamb, or so much in money for them at the pleasure of the tenant. And note that the Statute 31 H. 8. was necessary in that case, because the dissolution else would have ceased the privilege, whereas in this case there is no cause of ceasing, because it dependeth not upon any thing that ceaseth. But it seemes, that had not the Statute of dissolution provided for the continuance of the privilege of Abbots, they had all dyed, so then it seemes that the very tithe had revived *Quere*.

Now a word of the exception:

It hath bene said, that the prescription of the *Modus decimandi* is not well laid, because the Parke concerning which the prescription should be, is not layd to be by prescription, but onely laid to be *antiquus parcus*.

Whereunto I answer two wayes:

First, that the prescription is layd not in the Parke, but in an 140. acres in Cowfield, late parcell *cujusdam antiqui parci*, and that the tenant and farmers of the same 140. acres have used to pay unto the Vicar of Cowfield two shillings yearely, and one shoulder of every third Deere killed within the Parke in satisfaction of all tithe payable for the 140. acres.

Again, the liberty of Parke is not in question, but a forme of tithing concerning the Parke, and therefore no cause to lay the prescription in the Parke, according to the rule in the Bishop of Salisburies case, Co. lib. 10. fo. 59. where one claimes the office of a Surbepor by grant from the predecessor Bishop with a fee, and avers, that the same was *Antiquum officium*, and it was held nought, because he claimed the office it selfe by prescription; so here, if he were impleaded in a *Quo warranto*, for the Parke it selfe, it shall be no plea, to say that it was *Antiquus parcus*, but there he must plead a prescription for the Parke; but where another thing is claimed as incident to the same otherwise it is, as where a keeper claimes profit of a Parke by prescription hee shall not

not a prescription in the Parke, but *Antiquus parvus* generall, 6 E. 6. Dier. 71.  
But if the disparking be a point materall it is utterly insufficiently pleaded;  
for it is a word vulgar, and even in vulgar sence uncertaine; for common  
speech takes a ground disparked, when onely the Deere are taken away, though  
the pale stand, and the liberty of the Parke be sound. But it is a word utter-  
ly unknowne to the Law, and therefore can bears no illas without more certaintie;  
and the particulars of disparking are onely that the Deere were utterly de-  
stroyed, and the ground turned to arable and pasture, so the pale may stand and  
the liberty perfect, and so may be restored in *integrato* at any time. Another grosse  
mistake is, that he said the disparking to be by the occupiers and possessors and not  
by the owners.

### Sir Marmaduke Wivels Case.

A case of *Quare Imped.* brought by Sir Marmaduke Wivell, this was the  
point. Tenant in taile of an Advowson, and his sonne and heire joyned in a  
grant of the next Advowance. Tenant in taile died and it was adjudged, that  
the grant was utterly voyd against the sonne and heire that joyned in the grant,  
because he had nothing in the Advowson, neither in possession or right, nor  
in actual possibility at the time of the grant. Whereupon a writ of error was  
brought, but the error was assigned onely in a discontinuance, for the judge  
sent was given upon a Demurrer.

*Quare Imped*

Tenant in taile  
& his sonne  
joyned in a  
grant of an  
Advowance.

Error.

### Harvy versus Duckin, Pas. 13. Jac.

Case.

Harvy an Attorney brought an action upon the case against one Duckin,  
and declared; that whereas one White had made him a Bill of forty pounds  
and had sealed and delivered the same, the defendant spake these slanderous  
words of him; That he had shewed him a Bill of forty pounds (meaning that  
Bill) unsealed and after shewed it him sealed. And that he had forged the said  
Bill to the said writing, the defendant by inducement of other words, traversed  
these words. And it was found for the plaintiffe, and yet judgement was given  
against him, for the *Innuendo* was of no use, for since the words were onely a  
writing, which is utterly uncertaine, an *Innuendo* will not change the matter  
of the words, for that is to make the words otherwise then they were by an  
*Innuendo*.

Action of the  
case that he  
had forged a  
seale.

Out of the Court of Wards came this Case.

Cherquer,

### Sir William Fleetwoods and Sir Roger Astons Case.

Sir William Fleetwood, late Receiver, there being indebted to the King for  
Surrerages of his receipts, and being seised in fee of the manors of Cranford  
Saint-Iohn and Cranford le Mote in Mid. did convey the same to Sir Roger  
Aston in fee, and he conveyed it to the King, his heires and successors, and present-  
ly tooke it againe from the King to him and his heires, *Reddendo annuatim pro*  
*Manerio de Cranford Saint-Iohn 34. shillings, & pro Cranford le Mote 20s.*  
*pro omnibus aliis redditibus, serviciis, exactionibus et demandis quibuscunque.* And  
after Sir William Fleetwood became farther indebted upon his account to the  
King. The question hereupon made by Master Attourney of the wards was;  
Whether the said manors were extendible, and payable to any of the debt aforesaid.  
By Lord Coke and I were of cleare opinion, that they were not chargeable;  
for the land it selfe, was never chargeable for it selfe but in respect of the person  
which was Debtor; as in the case of a Statute. So as when the King takes the  
land the debt is not thereby discharged, but may be recovered against the Debtor  
himselfe, but the land it selfe in the Kings hand is not chargeable. And then  
when the King conveys the land over, he cannot against his owne conveyance  
charge

The King takes  
lands of his  
debtor and puts  
it away againe,  
the land is  
freed.

charge his land, although the debt be of such a nature that it gives no right in the land, and therefore a release made by the King to the tenant of the land of all rights and titles, doth not discharge it. Yet against his owne conveyance (the) connise of a Statute in such a case, cannot require contribution, which is the reason of the bookes, that all other lands in the hands of other feoffees, are by that occasion discharged, though such as be in the hands of the debtoꝝ himselve are still chargeable, and we made no regard of the *reddendo* here, as of no use in this case.

But [my Lord Chief Baron] made a doubt of this in respect (as he said) that he tooke the use of the Exchequer to be otherwise, except the Kings Patentee had the ordinary clause of covenant and grant to be discharged of all duties, debts and demands.

And therefore we all agreed, that our opinion in this case should be made up in the decree for the discharge of this land, without prejudice to the use of the Exchequer for the Kings debt there.

The Kings ward  
Knights.

The Attorney of the Wards asked another question by word of mouth, which was: If the King Knights his Ward within age after the death of his father, whether thereby he lost the wardship of the land, so as thereby the Ward may presently require livery though he be within age.

And we were of opinion, that though the value of the marriage remaine due, notwithstanding such Knighting, because the said marriage was vested in the King before; as it was resolved in Drewries case; yet the reason of that case will guide this: for by the making him a Knight, the King allows him to be of full age, and so for the time past the profits are well received; but from thenceforth the wardship is to cease, and so consequently the profits, and be to sue his livery presently.

For. Reverter,  
Co. B.  
v. Case,  
essoine.

### The Earle of Clanrickard & uxor versus Robert Viscount Lisle.

For the day of  
appearance for  
vouchees,

The Earle of Clanrickard and his Wife, brought a Formedon in Reverter against Robert Viscount Lisle, *ut supra*, wherein he was essoigned after the view and then pleaded in abatement of the writ *ut supra*, which was adjudged good *ut supra*, and then vouched two, whereof one was first essoined, and then the other with an *idem dies* alwayes to the demandant, tenant and vouchee. And now *Quindena Pas.* which was the last day of the essoine, both the vouchers appeared, and at the same day my Lord Lisle Tenant cast an essoine both for himselve and his Attourney. And it was excepted unto, that this essoine lay not according unto the booke 3 H. 7. 13. which being spoken to at the barre twice or thrice, was at last spoken to by the Court, and agreed *una voce* [by my selfe] [Winch.] [and Nichols] that the essoine did lye. For first there is no Statute that takes away the essoigne in this case, so then it is to be judged by reason, bookes and presidents of Court.

Now, for bookes, that of 22 H. 6. is directly the principall case, and the essoine excepted unto there, as it is here, and it was allowed clearely by the Court with this reason, That the tenant may say, that the vouchee is not the same person, and may have divers other pleas against the vouchee: And 5 E. 3. essoine 54. is the like; where the first vouchee was essoined after an essoine of his vouchee. And 13 E. 3. essoine 6.

Now the presidents are cleare and common to the same purpose, and a roll of that booke 22 H. 6. which is the very case was, found according to the booke betweene Crulle and Mansell, Mich. 22 H. 6. in the essoine roll. And so Hill. 34. H. 6. betweene Belgrave and Harding, and divers others, but the booke of 3 H. 7. was



was not warranted by any roll, for I caused it to be searched.

Now the reason of the case is this, that though the tenant had an essoine before, that was in another respect, that is to say, betwene him and the other demandants: but now he was in another order and degree of plea, betwene him and the vouchee, who being not yet entred into the warrantie might (as before) either himselfe vouch for the tenant; but if he were once actually entred into the warrantie, then he could be no more essoined, nor the tenant, who had now done with the vouchee, and was also out of pleading against the demandants, because his plea was put in to the mouth of the vouchee.

And therefore the booke 29 E. 3. 48. Simkin Simons case it is resolved, that the vouchee and tenant may have either of them one essoine before they enter into the warrantie. But now though the essoine be granted in respect of the pleas that may arise betwene the vouchee and tenant as hath beene said, yet is it to be entred betwene the tenant and demandant, and not betwene the tenant and vouchee, as the said booke is 29 E. 3. 48. And *idem dies* is still to be given to the parties not essoined. And though the essoine here were cast both for the tenant and Attourney, yet it was good enough being but a surplussage for the one.

So the essoine was adjudged and adjourned here as due, and is also the most late, because it is error to deny the essoine when it ought to be granted, and not *contra*.

### Richard Cox versus William Barnsly, & alios.

Richard Cox brought an action of trespass against William Barnsly and others for breaking his close at Bromsgrove, whereunto the defendant upon the new assignment pleaded not guilty, and the Jury found a speciall verdict thus: that Barnsly the defendant was seised of the land in question, and had the same of the Manor of Bromsgrove which is ancient demeasne, and that Cox recovered against him 40 pounds in the Common Pleas, and tooke out an Elegit by force whereof the Sheriffe delivered him the land in question, and entred, upon whom Barnsly and the rest entred, whereupon Cox brought his action of trespass, & si &c.

Trespass.  
Co. B.  
Wigorn. Hill.  
10. Jac. Rot.  
2541.  
Ancient de-  
measne barres  
not execution  
by Elegit.

So the whole question was: Whether the lands in ancient demeasne may be delivered in execution by the Sheriffe by force of an Elegit out of the Kings Court. And it was adjudged by the Court [Waiberton being absent through sickness this terme] that the execution was well done. Yet it was agreed,

First, that no freehold holden in ancient demeasne could be recovered in the Court of the King.

Secondly, that though the freehold were not to be recovered by the action, yet if the possession was to be recovered by the action brought in the Kings Court, ancient demeasne is a good plea; and that is Aldens case Co. lib. 5. though the *ejectione firme* be brought by the lessee against the lessor, and 46 E. 3. 10. 1. A writ of ward lyeth not in the Kings Court nor a writ of waste, though it be of a lease for yeares. 7. & 8 H. 6.

Thirdly, some actions lye not at the Common law though they touch not the possession, for the presumption that they would bring the title of the freehold in question, because they commonly do so; as a Replevin and an action of account of profits of lands, 40 E. 3. 40. 46 E. 3. 1. 21 E. 4. Fitz. ancient demeasne 6. but in trespass *vi & armis* upon the Stat. 5 R. 2. though the freehold come in debate, yet ancient demeasne is no plea, 46 E. 3. 1. & 2 H. 7. 17. the cause is, as one booke says, that the issue is upon the wrong. And the other booke saith, Court of ancient demeasne hath no jurisdiction.

Another point considerable is this.

That if a new action be given by Statute which lyeth in the Kings Court and will not lye in ancient demeasne, yet if that action meddle directly with the possession, you shall rather lose your action then have it in the Kings Court, to the prejudice of the privilege of ancient demeasne. And that is the case of an action

action of waſte, 7 H. 6. 35. & 8 H. 6. 34. But the reaſon is given in booke, that the tenant in ancient demeſne ſhould not be ſubject to ſtatute lawes, be-  
cauſe they do not contribute to fees of Knights of Parliament, and ſo may  
ſeeme to have no voice there. I hold that concept vayne, for that is but an eaſe  
granted them in favour of their labours of the earth, as many others have  
freedome from ſervicing in Turres, Pontage, Purage, and many ſuch, and F. N. B.  
128. The Villains of Lords of Parliament are free from contribution to the  
fees of Knights as well as they, and we ſee that they are ſubject to all other  
ſtatutes not concerning their freehold as well as others.

Againe, actions at Common law upon which no remedy could be had in an-  
cient demeſne do lye in the Kings Court though they ſtirre the poſſeſſion, as  
*Quare Imped.* 7 H. 6. 35. becauſe they cannot write to the Biſhop, whereof the  
reaſon is, becauſe the Common law being as ancient as their privilege is,  
may not indure that by pretence of privileges there be a failer of originall right,  
as that eaſe is. But of new rights or remedies brought in by ſtatutes, (which  
are not preſumed to intend their prejudice) it is otherwiſe.

Now to the caſe in queſtion. Though it be true that the poſſeſſion of land  
in ancient demeſne be gained by the Sheriffs act following upon award of the  
Kings Courts, yet the land it ſelfe was never put in plea directly in the Kings  
Court, and therefore differs from all other caſes beſore mentioned, and therefore  
touching that there is 2 E. 2. Fitz. execution 118 expreſſe, that the cognizee of  
a ſtatute having taken land in ancient demeſne in execution, had an aſſize  
of it in the Kings Court, and had judgement. And 7 H. 7. 10. it is admitted  
that ſuch an execution is good, for otherwiſe the diſputations were vaine to pre-  
ſerbe it againſt the recovery had by robin againſt the freeholder. And Aldens  
caſe is of opinion for it; and 7 H. 4. 50. 14. it is ruled, that upon an action of  
debt brought againſt the heire in the Kings Court for the debt of his anceſtor,  
lands in ancient demeſne deſcended, ſhall be liable to the execution. Againſt  
which booke there is only 8 E. 2. Fitz. execution 136 expreſſely, and 15 E. 3. Fitz.  
execution 62. which is ſlight, for 22 Aſſize. 45. is no other but that an Aſſize  
lies not for him that hath ſuch an execution in the Kings Court. Whereupon the  
Reporter inferres his ſingle opinion, that therefore execution cannot be of ſuch  
lands, which is no conſequent, for a man may take a leaſe of ſuch lands though  
he cannot have an *ejectione firme* of them. And the Chiefe Juſtice ſaid he was  
of opinion, that though an Aſſize in this caſe could not lye in the Kings Court  
for him that hath ſuch an execution, yet he may have an Aſſize in the Court of  
the Manor by writ of right cloſe and proteſtation to ſue it in the nature of an  
Aſſize, though the Aſſize in this caſe be given by ſtatute like to the caſe 14 H. 4. 20.  
where Hankford is of opinion, that if a man have cognizance of pleas, it ſhall  
not ſerve him for a new action created afterwards by a ſtatute, but if an old  
action be afterwards given by ſtatute, in a new caſe it will ſerve, and ſo here.  
And the Chiefe Juſtice further ſaid, for another reaſon he held this caſe cleere,  
that ſince the judgement was good, that Cox ſhould recover the debt, and that  
the Elegit did warrant the extending and delivring halfe his land, and the  
ancient demeſne is his land, as well as other, ſo as he had warrant to deliv-  
er it; and is not to diſpute what is liable, and what not; neither is the Sheriffe,  
nor he that receiveth it of him ſubject to an action of treſpaſſe, as if it were a *nulli-  
tie* in the act, but perhaps if it were relievable, the way to relieve it, were by  
*Audita Querela*, becauſe there was no time to plead it beſore.

William Keble Executor of Robert Keble  
against Osbaston.

Debt.

Co. B.

William Keble executor of Robert Keble brought an action of Debt upon a Bill obligatoꝝ of 31 pounds 13 Shillings 4 pence, against Francis Osbaston executor of the Testament of another William Keble. The defendant pleaded that the said William Keble the supposed testator dyed intestate, and that before this w<sup>it</sup> purchased, the administration of his goods was committed to one Edward Keble who administered and still doth. The plaintiffe replieth, that William Keble dyed intestate, and that after his death, and before the administration aforesaid granted, divers goods of his (and names them particularly) to the value of this debt, came to the hands of this defendant, which goods the defendant as executor to the said Keble *Administavit seu aliter ad usum suum proprium disposuit & convertit, & hoc &c.* Whereupon issue was taken and found it against the defendant in the disjunctive as aforesaid, and it was adjudged for the plaintiffe, for the point in issue is directly found, and so it is within the statute of Jeofailles; & the issue also is not improper, for though the verdict be true, if either hee did administer, or otherwise convert it to his use, yet both must be as executor, for so is the pleading and the verdict, and then it is but the same thing spoken two wayes, one according to the proper stile of Law, the other according to common speech; and therefore if issue had bene taken only that hee had converted the goods to his owne use, perhaps it would have bene good enough, especially if it were added as executor, as here it is. And since there was an execution in wrong before the administration granted, the plaintiffe had cause of action vested in him, which shall not be taken away by the administration granted after though it be before the action brought, the rather because those goods taken away by wrong before the administration shall not be assets in the hands of the administrator till they be converted or damages for them.

London.

Waller.

Trin. 12 Jac.

Rot. 4087.

Verdict in the disjunctive.

Executors by wrong and then administration taken.

Nichols versus Grummion.

Debt.

Thomas Nichols brought an action of debt upon an obligation of 40 pound against Joane Grummion, the condition was, to performe an Award to be made & delivered in writing. The defendant pleaded that they made no Award. The plaintiffe shewed the Award made *De & super premissis in Conditione, &c.* in writing, which was, that the defendant Joane should depart from the house wherein she dwelt, and other things which appeared not to concerne the plaintiffe, and should pay the plaintiffe three pounds ten shillings, and assigned the breach in that. The defendant rejoined that the wardsmen made no such Award, whereupon issue was taken and found for the plaintiffe, and yet it was adjudged against him, because it was an arbitrament but onely on one side, and so void, and none in law according to the booke 7 H. 6.

Hill. 12 Jac.  
Rot. 3027.

Arbitrament on the one side onely void.

For, though as Baspooles case sayes, an Award may be made by parts, the submission being by word, and though it be upon bond in the common forme for all causes, so as the same Award &c. it shall not be extended further then the causes made knowne to the wardsmen, yet it must in that case end all controversies appearing to the Court, or else it satisfies not the Condition of the Obligation; whereof it followes that because every controversie is betweene two parties at the least it appeares to the Court the controversie cannot be ended, except it be ended in respect of them both, and that may be either expressed or implied. Expressed, as if an Award be, that an Obligor in a single Obligation shall pay the debt, this is no Award, except it be proved, that he be discharged because payment is no discharge in that case; but if the Award be, that he shall pay ten pounds for trespassse, it is good, for a satisfaction implies a discharge.



And that is the reason of the judgement in Baspooles case. Now here in the principall case there is nothing awarded for the defendant, and the three pounds ten shillings appointed to be paid is not said for what; so it can imply nothing, neither can it be holpen by any averment; for the arbitrament is conditioned to be in writing, and yet indeed there was no averment that the three pounds ten shillings was Awarded for any cause certaine: But if another action were brought for the trespassse, no doubt this Award may be pleaded with an averment.

There was no judgement in this case, for though I was cleare, and am cleare of that opinion, and the rest concurred, yet there was some baryping after; and so it hung, and I think was compounded, for I heard no more of it.

### Inche versus Rolls.

Out of the Court of Wards came this cause betweene the Attorney *curia Wardorum* at the relation of William Inche Committee of William French the Kings Ward plaintife, and Andrew Roll defendant.

Upon a *Diem clausit extremum*, after the death of John French, father of the Ward, it was found that he held one messuage and twenty acres of land in Kirtisham in Cornwall of the same defendant in Knight service, and that the said John French did likewise hold one messuage and eight acres of land in Wharptone in Cornwall of the late Queene Eliz. as of her Manor of Enterden in Cornwall by fealty, and three shillings rent per annum, & per quæ alia servitia *Iuratores ignorant*.

*Melius inquirend.* at the Common law is but additionall to the first Office,

Afterward a *Melius inquirend.* was awarded upon supposall, that the land was holden of the King by knights service, upon which *Melius Inquirend.* it was found that he held the said messuage and eight acres of land in Wharptone of the Queene by knights service. The question is, whether the lands are holden of the King by knights service in Capite or not. It was said for the King, that an originall office found as this office is upon the *Melius Inquirend.* would have made a tenure in Chiefe. And it was also said, that Trin. 12. Eliz. Dier. 292. it was resolved, That where an office was found that lands were held *de Domina Regina, sed per quæ servitia Iuratores ignorant*, and thereupon a *Melius Inquirend.* was awarded, whereby the tenure was found to be of a subject, That now the first office was void, and the *Melius Inquirend.* was in the nature of the first writ of *Diem clausit extremum*.

But it was now resolved by [Hobart] and [Tanfield] Coke being absent, that in this case, the tenure by knights service of the Queene, found by the *Melius Inquirend.* shall be taken to be found of the Manor of Wharptone, whereof the reason is that the *Melius Inquirend.* is in his owne nature at the common Law but a Supplement to a defect or uncertainty of a former office, and so here the tenure being first found certainly of the Queene, as of a Manor, and by some services certaine, and the uncertainty only for some other part, when the *Melius Inquirend.* comes it perfects that, and so both make but one office, and must be joyned together. Now for the case of the 12. of the Queene, it was nothing to the purpose; for that is a *Melius Inquirend.* not at common Law, but grounded upon the Statute of 2 E. 6. and taking his nature and force from thence. Wherefore the resolution is expressly, that the *Melius Inquirend.* there, is as the first office, and absolute of it selfe by force of that Statute, which is but in two cases mentioned in the Statute.

Holmes verſus Twiſt.

Thomas Holmes brought an Aſſumpſit againſt John Twiſt, and declared that he was poſſeſſed of a heap of wood containing ten tonnes, and that Twiſt in conſideration that Holmes would ſell and deliver him one tonne of the ſaid wood, he would pay him ſoꝛ it within ſix moneths after the rate that he ſhould ſell the reſt, and ſhewed that he ſold and delivered unto Twiſt the tonne of wood, and after ſold unto one Collins the reſidue after the rate of 23. pounds a tonne, and the defendant paid him not the 23. pounds according to his promiſe, and thereupon judgement was given ſoꝛ the plaintife in the Kings Bench, and now upon a writ of Error in the Exchequer Chamber, the judgement was reverſed, becauſe the plaintife had not alleaged that he had given notice to the defendant of the ſale and price of the reſt, being a thing of his private knowledge, and not like the caſe of a Bond to perſorme the award. And ſome Judges of the Kings Bench allowed of the reverſall, and tooke no knowledge of the judgement.

Berkſhire.  
Trin. 12.

Jac. Rot. 1758.

Notice muſt be  
of a thing ſe-  
cret.

See & Menfield.

Edward See ſold the Manor of Buckland in Kent, being holden in chiefe, to Thomas Menfield and Dorothy his Wiſe, and to the heiſes of the ſaid Thomas to the ſame uſe, then Thomas and Dorothy levied a fine of the ſaid Manor to A. and B. to the uſe of them during their lives, the remainder to the uſe of Thomas in ſaile, the rem. to the uſe of a ſtranger in ſaile, Thomas died. It was reſolved by [Hobart] and [Tanfield] that Dorothy was not to ſue liberty of any part of the land, ſoꝛ it was no advancement to her from her husband of his lands within the Statute.

Curia Ward-  
rum.  
Wife not ad-  
vanced with-  
in 32 H. 3.

Freak & Mabell Vxor againſt Edward Binford.

John Freak and Mabell his Wiſe, brought a Forſmedon in Remainder, againſt Edward Binford of 3. Meſſuages, &c. in Alſtrington, which Roger Linſey did give to Elizabeth Coxton, and the heiſes of her body, the rem. to John Piſing and his heiſes, *Et qua poſt mortem prediſtorum Eliz. & Johan. Piſing preſat. Iohanni Freake & Mabell fil. & hered. Robert Piſing gen. fratris & hered. Hugonis Piſing gen. fil. & heredis pred. Johan. Piſing remanere debent per formam donationis pred. eo quod pred. Eliz. obiit ſine hered. de Corpore ſuo exeunte &c.* The tenant pleaded in Abatement of the writ, that the demandant ſhould by the ſoyne of the Register have ſuppoſed that the Meſſuages &c. poſt mortem pred. Eliz. & John. Piſing preſat. Iohanni Freake & Mabell ut Conſanguin. & hered. prediſt. Joh. Piſing remanere debet per formam donationis pred. which concluſion he bath not made. And it was ſaid, that the writs of Forſmedon in Remainder in the Register ſo. 243. 244. and 246 were all ſo concluded: And of that opinion was Juſtice [Warburton] but [my ſelfe] and [Winch] and [Nichols] held the writ good enough, in as much as it appears to the Court, by the Pedegres as it is ſet downe, that the ſe and needs muſt be Cozen, and heiſe unto John Piſing, ſo as it is but *palma pro pugno*, the ſame thing moze largely ſpoken, and the ſoyne of the Register may beare ſuch an Alteration, and therefore 5 E. 3. 35. & 7 E. 3. 47. 48. cited in the Register.

Co. B.  
Devon.  
Brownlow.  
Hill. 11. Jac.  
Rot. 30.  
A brieffe vary-  
ing from the  
Register but  
equivalent.

Forſmedon in rem. upon an eſtate ſaile, limited to P. and K. the rem. to F. in fee, & *qua poſt mortem* P. and K. to T. Sonne and heiſe of F. ought to remaine; And the writ was adjudged good without laying expreſſely the death of F. though it were urged, that the ſoyne of the Register was ſo, becauſe the laying of T. to be heiſe of F. doth import as much.

And 11 H. 6. 20. in Forſmedon in deſcender the demandant made himſelfe heiſe unto every one that had bene inheritable to the intaile, though by the

Register, hee should make himſelfe heire onely unto them that were ſeiſed by force of the intaile, but yet the writ was holden good, for now hee muſt needs be heire to all that were ſeiſed, but he muſt not faille to make himſelfe heire to all that were ſeiſed. And 2 H. 6. 11. an Action of waſte was brought, and the writ was *vaſtum in domibus & hominibus* and allowed good though it wanted the word *exilium* which is the word of the Register, and proper.

Richard Foſter Doct<sup>r</sup> of Phyſick plaintife.

Anne Jackson widow defend<sup>ant</sup>.

Trin. 10. Jac.  
Rot. 38. 14.  
*Sci. fac.*  
Crompton  
London.  
This was ad-  
judged againſt  
Foſter the  
plaintife Trin.  
13. Jac. upon  
open and large  
Argument at  
the Bench.  
Warburton &  
Winch to the  
contrary.

A large caſe  
judged that  
a man dying in  
execution the  
party his  
heires, execu-  
tors &c. are  
no further  
chargeable.  
And of executi-  
on generally at  
large.

Executions &  
their natures  
at large.

First point.  
Second point.

**R**ichard Foſter brings a *Sci. fac.* againſt Anne Jackson widow, and Miles Jackson, executors of the laſt will and Teſtament of Thomas Jackson containing, That whereas the plaintife in Mich. Terme. 6 Jac. had recovered againſt the ſaid Thomas in the Common pleas as well a certaine debt of 2300. pound as 16. pound for damages, why he ſhould not have execution againſt them of the ſame judgement: the defendants plead that the plaintife ought not to have execution againſt them of the goods and Chattells of the dead. For they ſay that the ſaid plaintife after judgement in the liſe of the Teſtator, ſcilicet the 13 day of Feb. in the ſaid ſixth yeare did proſecute *quoddam bre. ipſius domini Regis de Capias ad ſatisfaciendum* againſt the ſaid Thomas upon the ſaid judgement, to the then Sheriſſes of London directed returnable xv. Paſch. by force of which writ the ſame Sheriſſes, beſore the returne thereof, that is to ſay, the 11. die Martii tooke the ſaid Thomas, and had him in Priſon, and kept him for the debt, and damages aforeſaid. And the ſaid Thomas ſo being in execution after and beſore the returne of the ſaid writ, dyed in execution, and that the Sheriſſe returned the writ ſo, and demanded judgement and the plaintife ſaith, that the ſame Sheriſſes of London, did not take the ſaid Thomas Jackson and him in Priſon and under their cuſtody in execution for the debt and damages aforeſaid had and detained by vertue of the ſaid writ of *Capias ad ſatisfac.* prout &c. whereupon iſſue was taken and the Jury finde that the Sheriſſes *virtute brevis de Cap. ad ſatisfac. infra ſpecificat. non ceperunt &c. ſed dicunt quod ceperunt &c. virtute cujuſdam brevis de alias Capias ad ſatisfaciend. in Recordo prædicto minime ſpecificat. in quadam exemplificatione inde confeſt. et jurator oſten' cujus tenor' &c. ſpecificat.* And ſo ſet downe the writ of *Alias Capias* at large of the ſame Teſte, the ſame returne and all things, onely it had not any averment, that the perſons and judgement and all things are the ſame, and concluded *ſi ſuper tota materia*, the Court ſhall thinke that the Sheriſſe tooke him by force of the *Capias* within mentioned, then they ſhinde for the defendants; if otherwiſe, then for the plaintife.

The caſe depends upon two points.

First, whether the verdict be found for the plaintife, or the defend<sup>ant</sup>.

The Second, whether the death of Thomas Jackson in execution be an abſolute diſcharge of the debt, againſt him, his heires, executors and Adminiſtrators, ſo as no new action or execution, can be had againſt them or any of them.

Touching the firſt point there ariſeth theſe Queſtions.

1. First, whether the former part of the verdict be peremptory, which finds that the Sheriſſe tooke not Jackson, by vertue of the writ of *Capias* mentioned in the plea, or whether the reſt that followes, that hee tooke him by vertue of an *Alias Capias*, not mentioned in the Record, and ſets forth that ſpecially with conclusion, if upon the whole matter, &c. and leave it to the Court, doe correct the firſt part.

2. Next whether the *Alias Capias*, being underſtood of the ſame cauſe, perſons &c. will maintain the defendants plea.

3. Laſtly, whether this *Alias Capias* ſhall be underſtood of the ſame judgement mentioned in the defendants plea, becauſe the verdict hath no averment expreſſed, nor by the word *pred. &c.*

And to the firſt queſtion upon the firſt point.



If the verdict had proceeded no further, then to the generall negative, that the  
sheriffes did not take him by vertue of that writ, it had bene cleare againſt the  
defendant.

To the first  
Question up-  
on the first  
point.

But wheresoeber a Jury doth begin with a ſpeciall matter, and after makes  
a generall concluſion upon it, contrary to that which the Law and the Court  
do judge upon the ſpeciall matter found by them, or on the other ſide when they  
begin with a direct verdict and yet after deduce a ſpeciall matter which is con-  
trary to their direct verdict, or in law proves the truth contrary to their generall  
verdict premiſed, and cloſed them up, with ſubmitting the whole to the judge-  
ment of the Court, as in this caſe it is; in both theſe caſes the ſpeciall matter  
makes the verdict and ovrules the generall. As for example.

20 Eliz. Dier 362. in debt againſt executors the defendant pleaded *plenie-  
ment adminiſter*, where upon iſſue was taken, the Jury finde that the teſtator  
had made a leaſe for yeares of a houſe and implements of houſehold rendring  
rent and dyed, and that the executors had received the rent and concluded *iſſint  
aſſets*, yet the Court judged upon the ſpeciall matter it was no aſſets, becauſe  
the rent ranne with the reversion, and ſo belonged not to the executor.

20 Paſch. 22 Eliz. Dier. 370. One brought a writ *de plegiis acquietandis*,  
and the Jury found that the plaintiffe was bound for the defendant, as his ſurety  
in an obligation with him jointly and ſeverally, and that being impleaded he  
payed a plea &c. and yet judgement was given againſt the plaintiffe; for as this  
caſe is they were both principall, and neither pledge nor *ſidejuſſor* to the other.  
And this action lyes not but where one is named expreſſely as ſurety in the  
bond, which was not ſo in this bond.

And Paſch. 2 & 3. Ph. & Mar. Dier. 115. debt upon an obligation for  
performance of covenants whereof one was that he ſhould doe no waſte, and iſſue  
taken whether he ſelled 20 Wakes, it was found that hee had not ſelled 20 Wakes  
but he had ſelled 10. and it was adjudged for the plaintiffe, yet if upon the firſt  
point it had reſted there, it had bene found for the defendant.

Note that 10 did not prove the iſſue of 20 literally, but it proved the breach  
cleare within the iſſue. *Quere*, if it had bene Wakes for Acres or the like, for  
either had bene waſte, and the very iſſue in contemplation of law is waſte or  
no waſte, and the reſt is a certainty of ſoyne, ſo in Townſends caſe  
Flo. 111.

As to the ſecond branch of the firſt point, whether the *Alias Capias* can be  
taken within the iſſue. Firſt, lay this for a ground, that if the Jury finde any  
thing that is merely out of the iſſue, that ſuch a verdict, for ſo much is utterly  
void and of no force though it conclude in generall, for or againſt the plaintiffe  
or the defendant, whereof the reaſon is plaine, which is, that the Jurors are  
ſpeers of matters of fact put in iſſue betweene the parties, and their oath  
which containes their commiſſion is, that they ſhall truly trie the iſſue betweene  
party and party. And ſo is the *ven. fac. ad triand. exitum non ad triandum juſ.* as in  
a writ of right, ſo that whatſoever they doe try beſides the iſſue is *per non juratos*,  
as a caſe judged by the Court that hath no jurisdiction of the cauſe, *coram non  
Jude*, and utterly void, for a verdict muſt not be to the action what might have  
bene pleaded, but to the iſſue which is pleaded, and in their charge. And if that  
other point had bene pleaded it might have had an other answer and evidence.  
And therefore the entry of the verdict in the record is, *Qui ad veritatem de infra  
contant. Jurati dicunt ſuper ſacramentum ſuum, &c.* And ſo upon the matter,  
if that extravagant part of the verdict be falſe, it is no perjury, neither doth  
any attaint lye upon it, for there is no party grieved nor any thing to be reſto-  
red, neither can it be uſed as evidence in any other triall, becauſe there is no  
redreſſe if it be falſe.

The ſecond  
question upon  
the firſt point.  
Verdict out of  
the iſſue void.

And I hold it plaine, you cannot juſtifie to call him perjured upon ſuch a point  
being falſe. And ſo it is concerning a point of diſcourſe by Judges out of the  
point of judgement it may be a judicious and ſteddy opinion, and of ſome  
authoritie; but it is no part of the judgement, for no writ of error lyes upon it,  
and

and therefore it ought not to preoccupate nor preiudicate a judgement. And therefore 39 E. 3. 38. a writ of annuity was brought upon a prescription, the defendant traversed the prescription, whereupon issue was taken and found for the prescription. But further the Jury found that there was nothing of annuity behind, yet judgement was given for the plaintiffe.

So 43 Ass. P. 1. in Assize the defendant pleads himselfe a villaine, the plaintiffe that he was free and issue taken upon it; the Jury found him a villaine, and added that the plaintiff was seised and disseised by the defendant as the writ imported and that the Lord of the villaine had not entred. And yet it was adjudged against the plaintiffe, for jurors are bound to their issues, but Judges have power over the whole matter, and that hath also his bounds, all the matter within the record not at large.

Verdict unfavourable.

But howsoever the verdict seeme to stray and conclude not formally or punctually unto the issue so as you cannot finde the words of the issue in the verdict, yet if a verdict may bee concluded out of it to the point in issue, the Court shall worke it into forme, and make it serve. And therefore 47 E. 3. fo. 19. In a *Præcipe* one came in and said, that the tenant was tenant for life, and prayed to be received for his reversion. The demandant on the other side pleaded that the tenant in the action had fee, whereupon issue was taken that hee had not fee, and it was found that neither the tenant nor he in reversion had ever any thing, which is cleane besides the issue, and against the reason of the receipt. And it was adjudged that he should be received, for by this verdict it was found, that the tenant had not fee, which was all that was put in issue, for both the demandant and the party praying receipt allowed him tenant to the action, which must be at least a freehold, and that being agreed by the parties, the Jurors could not falsifie. And therefore the Book 19 E. 2. F. receipt 178, being adjudged contrary I do condemne.

One takes benefit of a verdict for another.

But on the contrary where an issue is well found it shall some times reliebe a stranger, as in the case of Tilly and Woody 7 E. 4. 31. Where an action of trespassse was brought against two for taking of goods, the one pleaded not guilty, and it was found against him, and the other pleaded, that the plaintiff had given him the goods, whereupon issue was taken, and that found against the plaintiffe, and therefore judgement was given against him, for the issue was well found, and the action being the same and both the defendants parties to it, and the Court seeing that the title was against the plaintiffe, no judgement could be given for him against the other. But if the plaintiffe had brought his actions severally, against either defendant (as he might) he should have had his judgement though perhaps the defendant might have bene relieved by us. And *quare* upon the other judgement, *tamen quare* of that.

Verdict fines in Al. cap. that was pleaded a Cap. generall.

Now admitting that a meere sozaine matter is void, yet in this case to the second branch of the first point, I am of opinion that the *Alias Capias* doth maintaine the plea of the defendant which is but thus. That whereas the plaintiffe had set forth his judgement and demands why he should not have execution against the executor, the defendant shewes that the plaintiffe had sued forth against the said T. Jackson in his life *quoddam breve de Capias &c.* a certaine writ of *Capias ad satisfaciendum super Iudicium predictum, &c.* *virtute cuius brevis*, the Sheriffes tooke him and had him in execution for the same debt and damage and that he died in execution, &c. And the plaintiff saies that the Sheriffes *virtute brevis pred. de cap. ad satisfaciendum predictum* Tho. Jackson *non ceperunt*, and thereupon issue is taken, so he denies that he was taken *virtute cuiusdam brevis de cap. &c.*

In every act there is a substance, a body, a principall, and there are certaine accessaries, or Accidents: And concerning this, it is a true *Axiome*, *Vnumquodq; maxime est id quod est principalius in ipso*, and therefore things are nominated *ex eo quod sunt per se, non per accidens*. Now then the substance is *Capias*, whether it be the first *Alias*, or *pluries*; those are but distinctions of number in order, there might have been moze colour, if he had pleaded it an *Al. Cap.* where

where it was the first, for that had not bene true in the words though in substance, and to the effect of the execution, it had been all one; But here as it is full to the substance, so it is not untrue, nor so much as mistaken in a word, for it is a *Capias* with a little addition, that may be spared. And *Capias* is the Genus, & Genus continet plura quam species, sed species non continet plus quam Genus. 36 H. 6. 2. A recognizance pleaded, the issue, *nul tiel* Record and, the Recognizance which was certified was upon condition, and yet good, 36 E. 3. 5. In an Account the defendant pleaded, that he Accounted before R. and W. upon which issue was joyned; and it was found, that he Accounted before Ronely, and it was adjudged for the defendant, 16 ass. 19. In assize the tenant vouched, the voucher pleads, that heretofore the plaintiffe brought an Assize against his Father who pleaded that the plaintiffe did infeoffe him by his deed and it was so found by the Assize, and he demanded judgement, and upon issue *nul tiel* Record, the Record was, that the said Assize was against the Father and Mother, and yet adjudged no failer, but the verdict must not wholly depart from the word of the issue 40. ass. 31. In an ass. the defendant pleaded the deed of the brother of the plaintiffe with warranty, and the plaintiffe denied the deed, and it was found not to be the deed of the brother, but the deed of the Father, and it was adjudged by good advise, as the booke saith against the defendant.

And I am of cleare opinion, that if the Jury had found, that hee had been taken with a *Capias pro fine*, or by a *Capias utlagar*. after judgement, and the plaintiffe had prayed that he should remaine for his satisfaction, that yet this had been against the defendant; for though he were taken by a *Capias*, and were also holden *ad satisfaciend*. yet it was not *quoddam bre. de Cap. ad satisfaciend*. which is a kinde of a writ certaine, yet it amounts to so much in effect, and the prayer for his remanding is a kinde of taking of charge of the nature of the writ. On the other side, if the Sheriffe had had this Jackson in execution by one *Cap.* at another mans suit, and then this *Cap.* had bene delivered unto him, and he had also charged him with that, I hold that that would have maintained his issue; for though he were taken before, yet this is a new taking in the law, as to this execution.

As to the third branch concerning the faults of averment, to apply the *Capias* that is found to the case in question, if this uncertainty had been in the plea of the defendant, it would no doubt have made it vicious, but being in a speciall verdict, it must be taken according to their intention, which is according to the common intent: therefore when the question is whether he were taken by force of the *Capias* mentioned in the plea, which is named without addition, and they give their verdict that hee was not taken by vertue of the *Capias ad satisfaciendum* within mentioned, but that he was taken by force of an *Alias Capias ad satisfaciendum*, not mentioned in the record at the suit of the same person against the same person of the same teste and returne of the same summe of debt, damages and judgement; It appeares plainly, that they understand it to be the same; for it is against sense, that either the Jury would have made, if the Court have suffered a speciall verdict, as a doubt, if this *Alias Cap.* had been upon another judgement, or between other parties.

If a plea of *Capias* may be maintained by an *Al. Cap.* which being the maine doubt; the Court must make no more doubts; the finding and tryall of the matter of fact, being onely the Juries office, and not the Courts, upon which point, see Goodales case, Co. 5. fo. 97. where in an *Ejectione firme per Goodale* against Wyat upon not guilty the Jury concluded their doubt upon performance of a Condition by payment of money by Sir John Packington to one Woodcliffe; but yet in making up their verdict, they had given the possession to the plaintiffe by lease, and laid the Entry upon him by Wyat, without any title under Packington, but that was included, and so not regarded.

And Fulwoods case, Co. lib. 4. fol. 65. where it was found that one *Recognovit coram recordatore & majore stapula se debere to another 200. pounds, without saying, per scriptum Obligatorium, or secundum formam statuti*, and yet holden good

The third question upon the first point.

Verdict speciall taken to common intent.



D. murrer  
upon a point  
certaine,

The verdict  
that the  
Sheriffes tooke  
him by force  
of the writ,  
not adding  
that they had  
him in  
execution.

Action con-  
fessed notwith-  
standing the  
Verdict.

The second  
great point.

Of execution  
personall.

good and effectuell according to common speech and intent, and the Earle of Shrewesburies case, Co. lib. 9. fol. 51. where the verdict said, *accessit ad locum usualem* to hold Court Baron; It was found that Sterne as Deputy to the Earle of Rutland *accessit ad Villam de Mansfield ad usualem locum ubi Cur. Baronii Manerii de Mansfield communiter tentafuit ad custod. il. Cur.* and that he was disturbed &c. by Woodward, Steward to the Earle of Shrewesbury. And holden well; for though this would not have served in pleading, for it must have been pleaded that the place was part of the Manor, or holden of it at least, where the Court was to be holden, yet it was allowed in verdict. But now, if this were in a Demurrer upon matter in Law, though the parties will joyne upon some one point, upon which if it stood alone, judgement should be given for the one party, yet if upon the whole Record matter in Law appeare why judgement should be given against the said party, the Court must judge so, for it is the office of the Court to judge the Law upon the whole Record, and the consent of parties cannot prejudice their opinions, nor quit them of their office in that point.

And therefore though Mountague in *Dive* and Manningsams case does stagger a little in that point, upon the booke of 34 H. 6. yet in conclusion he resolves that the Court must of office judge upon the whole Record.

Now, though the issue in this case be, whether the Sheriffes tooke him by force of the writ, and had him in execution for the debt and damages, and the verdict onely findes, that the Sheriffes tooke him by vertue of the *Al. Cap.* and say nothing to the having and holding in execution, yet it is well enough, for the consequence is necessary, because they could not take him by the writ, but he must be in execution. And also, because they conclude their verdict, that the Sheriffes tooke him by force of the *Cap.* within mentioned, then they tooke him in so far as the defendants pleade which runs to the whole, as well for the taking as the detaining, keeping and holding in execution.

*Nota.* That the dying in execution was not put in issue, but admitted, and therefore of that there is no verdict, so that there is no cause to argue it. But in respect that if the death be not a discharge, but a reviver of a new execution, then was the plea a kinde of confessing the action, and as the plaintiff might then have demurred, so the Court ought now to judge for him, notwithstanding the verdict be, except the Stat. of Jeoffaries help the defendant, like to 9 H. 6. 37. If in debt the defendant plead that he delivered the deed as his deed to be delivered upon condition performed, and not else; so it was not his deed, upon which issue being joyned, and found not his deed, yet it shall be judge d for the plaintiff upon the matter appearing to the Court to be confessed.

Now, upon the second great point, which is the maine question of the case, whether a man taken in execution for debt and dying in execution the debt be absolutely discharged by his death as against him; We would speake a little largely, because it is of great consequence, execution being the life of Justice, and necessary to be determined. And strange it is, that it hath not been hitherto brought to certainty, being a case that must needs often happen.

And therefore, first of executions in generall, I meane of executions personall, as I may call them, for debt and damage, for of executions upon real actions, whereby land is recovered, and damages sometimes withall, or of executions upon *Ejectione firme*, I will not speake.

Executions therefore as I call them personall are *Levari fac.* or *fieri fac.* by common Law; *Elegis* by the Stat. of Westm. 2. cap. 18. and *Capias ad satisfaciend.* by the common Law in tref. *vi & armis* being a direct and wilfull wrong. and by the Statute of 25 E. 3. in other cases.

For, at the common Law, upon an action of the case against an Host for goods lost in the Inn, or against the Sheriffes for an escape, no *Capias* lay, 42. E. 3. 11. & 42. ass. Pl. 17. for it was but *culpa* sometime *levis* sometime *lata*, & negligence, but not a wilfull wrong.

There

There is also sometimes execution of the body without a *Capias ad satisfaciendum*, as where the defendant is taken by *Capias pro fine*, for the King, which was also in cases of mere wrong, or upon a *Capias utlagat*, for the King after judgement, In which cases the plaintiffe may pay the defendant in execution for his debt, or may refuse it.

See the forme of the Entry of the prayer of the plaintiffe in such case, that the defendant may remaine in execution for him, for as much is implied in taking the *Capias ad satisfaciendum*, scilicet an election of that for his execution, now election implies rejection of the rest, for there is no election of all, neither can the body be taken for a time, or for a part as a *Fieri fac*, but it must be wholly and finally during his life.

Here I will consider two things,

First, where writs of execution being sued forth, doe utterly faile of their effect, what is their consequence to other writs of execution.

Next when they be executed in part, and not to the whole demand.

Now touching the relation of these executions amongst themselves, and their correspondency.

If I take out a *Cap*. or *Fieri fac*. and they take no effect, I may have one of them after another, or an *Elegit* after both if they faile; 15 H. 7. 14. 47 E. 3. 26. and therefore though 18 E. 2. F. Executors 132. as my Brother Nichols said, and Fairfax. 15 H. 7. 15. be of opinion that after a *Capias* returned *non est inventum*, the plaintiffe shall have no other execution, the law is not so. But if I take out an *Elegit*, and enter it of Record, and it be returned *Nihil* without effect. Now the question is, whether I be utterly remedlesse; And in this divers bookes are peremptory, that I am without remedie, because I have made (say they) my election, and that entered upon Record, and therefore I can never resort to any other; and so this effect are the bookes of 19 H. 6. 4. Newton. 5 E. 4. 41. a great opinion against two Judges that had granted it. And it is cited 5 E. 4. 41. to have beene so judged 30 E. 3. and 15 H. 7. 15. Fairfax accordingly, but also saith, What after a *Capias*, you shall not have an *Elegit*. But in al. *Elegit*, or an *Elegit* in divers Counties one after another, the plaintiffe may have, as the bookes are 21 H. 7. 19. 4 & 5 Phil. & Mar. Dier. 162. but these bookes notwithstanding, (whereof there is never a judgement but one, *scilicet* 30 E. 3. cited, which I find not,) I hold the law to be cleane contrary. And that where the party takes an *Elegit*, and can have no fruit of it that he may resort to another execution, though the election be entred of Record, yet 18 E. 2. F. execution 140. One had an *Elegit* into Dorset. The Sheriffe returned execution of halfe 24 Acres, the plaintiffe prayed a new *Elegit* into Suff. and was denyed all but Dorset. which is an Error.

And first for authorities directly to the point, 17 E. 4. 4. per Curiam, adjudged; after *Elegit* taken forth, the yeare expired before it was served, whereupon a *Scire facias* was sued out and upon that a *Capias* by judgement, notwithstanding the exception taken *ut supra*, for it was said that Westminster. 2. being affirmative, tooke not away the execution at common law. And it must be understood of an *Elegit* entred of Record, for otherwise there were no question or ground for it. And 47 E. 3. Fitz. execution 41. the opinion of Piercey and Fychden is, that where an *Elegit* is taken out and not served, the plaintiffe may have another execution, And 50 E. 3. 4. when Kirton said, that because an *Elegit* was awarded, and was returned *Nihil* yet no *Cap*. could be awarded, nor *Capias pro fine* served. Belknap answered, they would be advised of that. It seemes that the conceit of this peremptory issue of the election entred, hath been the cause, that the entrie of latter times hath beene forborne of Record, till first it appeare, whether any thing can be had by the *Elegit*, and then to enter the choice upon the Roll, when the *Elegit* is returned executed; but indeed when execution is made it is fit it be returned of Record, and filed, and not kept in the Attorneys pockets to hide and returne, when he findes his advantage. Now for reason of law in this case, there is none why a man should be prejudiced by

Of writs of execution sued forth, failing wholly of their effect.

Of executions having their effect in part.

*Elegit*, whether it barres other executions.

It is a captious  
injustice to  
stick so in a  
word to de-  
prive a man  
of his due.

*Turpis est pars  
que non conve-  
nit cum suo toto.*  
Now the  
generall rule  
of elections is  
clearly against  
the conceit of  
the writ of  
*Elegit*.

Adjudged in  
45 E. 3. 16.  
& 36 H. 6. 3.

ignorance *alieni facti* or *casus*, and therefore if I plead joyntenance in my selfe, I must shew of whose Feoffment, not so, of joyntenance in a stranger.

Next, it is mistaken if it be conceived, that the election that is made and recorded, is to be taken an election of the very writ of *Elegit*. For it is an election of the land &c. of the defendant *Elegit executionem de medietate terrarum*.

The words of the Statute of W. 2. cap. 18 are, that it shall be in the election of the plaintife to have a writ of *Fieri fac.* to the Sheriffe, to levy the debt upon the lands and Chattells of the debtoꝝ, or that the Sheriffe shall deliver him all the Chattells, and one halfe of the land untill the debt be levied: out of these words I note, that the election is applied to the *Fieri fac.* as well as to the *Elegit*. Again, that of the two, the case of the *Fieri fac.* is the worst: For it is said, that he may elect the writ of the *Fieri fac.* but for the other that he may not elect the writ, but the land it selfe of the debtoꝝ, to hold till he be satisfied, which supposeth land to be chosen, for if there be none, the choice is no choice; and the word *Elegit* is not the matter, but the act of election, which is in both executions alike. And therefore see Mich. 17. and 18. Eliz. Dier 344. where one granted a rent out of land, without saying *pro se & heredibus*, and then the grantoꝝ dyed, the grantee brought the writ of Annuity against the heire of the Grantoꝝ, who appeared and imparled till the next terme, and then the plaintife discontinued and after distrained, and made Abolwꝝ, and then the plaintife in the Replevin pleaded the writ of Annuity in barre; whereupon it was demurred, and it was adjudged for the grantee, for the person of the heire was not chargeable, and therefore the election was void and none in law, and therefore *per curiam*, though they had proceeded to judgement, in the writ of Annuity; yet the land might still have bene charged.

But now in the same case, if the writ of Annuity had been brought against the Grantoꝝ himselfe, it would have been bound for ever, and so it would have turned the rent Charge in Fee simple, into an Annuity, onely for the life of the Grantoꝝ. So you see that the election stands not in the choice of the writ of Annuity, for that may be idle and mistaken, but of the Annuity it selfe, when it is in being.

In Ravishment of a Ward, where the Jury found the infant within age and assessed damages to one hundred pound, if he were not married, but if he were married, to three hundred pound, the plaintife could not have a double conditionall judgement, although he could not know whether hee were married or not, and therefore hee was enforced to make election, and yet if hee chose judgement of marriage, and the hundred pound if the Sheriffe retorne that he is married, he shall have execution for the 3 hundred pound, for the election of the marriage is void, 36 E. 3. F. Gard. 11. 33 H. 6. 14. If the tenant infeof his heire within age, and the Lord receive of him his services in the life of the Father, yet he may take him in ward, after the death of the Father; otherwise it is if hee receive his services of him, after the death of the Father, for there are now divers things to make choice of, not so before.

Thus farre of writs of executions, that being sued forth, faile of their effect wholly.

Now of executions that have their effect in part.

If upon a *Fieri fac.* the debt be satisfied in part, the rest may be served, either by *Capias* or *Elegit*, 14 E. 411. 47 E. 3. 26. & 14 H. 7. 28. But in that case one had sued forth a *Fieri fac.* and before the retorne he prayed a *Capias*, but it was denyed him, till it should appeare upon the retorne of the *Fieri fac.* whether he had execution by that, so it seemes that there was some entrie of it of Record. So there is a kind of barre upon the electing of the *Fieri fac.* if it may be served, for there shall not be two severall kindes of executions out at once.

And upon the *Elegit*, if there be no execution but upon goods, because there is no land, and the goods appeare not enough, I am of opinion he may have a *Capias*, for now it is in effect but a *Fieri fac.* though the word be *Elegit*.

But if there be land extended, it is otherwise, and yet *quare* if the debt be 40. pound



pound and nothing extended, but a lease for three yeares at five pound a yeare of the like, for then as to that that remains, the *Elegit* saies, as in the other case, where nothing at all is to be had.

But if a *Capias* be executed, that is in Law sufficient for the whole debt; for *Corpus humanum non recipit estimationem*, so as if you take it at all, you must take it for the whole debt.

Now, to the maine Question:

First, it is agreed on all sides, that whereas the *Elegit* or *Fieri fac.* are both executions and satisfactions to all purposes, and against all persons, the *Capias* is a full execution, as the booke 22 ass. 43. saies; but it is not a perfect satisfaction in nature to all purposes, and against all persons.

Now how, and to what purpose and in what cases it is not a satisfaction, is the question.

First, I agree clearly, that it is not an actual satisfaction, no not betweene the parties, according to Hillaries case 33 H. 6. 47. where one was bound to satisfy for goods that he had imbezzled, and in debt upon an Obligation he pleaded that upon a suit for those goods, he was taken in execution for the same, and it was adjudged no plea. But this is nothing to the case in question; for without doubt it is no satisfaction to common speech, nor to a sojaine plea.

But the Question is, whether it be not *quasi* satisfaction, or satisfaction in law to that very suit.

For if an Executor release a debt, or discharge one in execution, it shall be accounted in law assets as received. *Tamen Quare.*

Again it is no satisfaction clearly, as to barre me to seek a satisfaction against another, lyable to the same debt or damages. And therefore, 29 H. 8. Brooke execution 132. 4 H. 7. 21. 20 H. 6. 11. 33 H. 6. 47. 14 H. 4. 19. and Blomfields case principally Co. lib. 5. fol. 86. B. and Joanes and Williams case cited there, are all cleare law, and yet make nothing to the case in question. For 4 E. 4. 38. 5 E. 4. 4. being all to one effect.

Again, I am of opinion, that if two be bound jointly and severally to me, and I sue them jointly, I may have a *Capias* against them both, and the death or escape of the one shall not discharge the other.

But I cannot have a *Capias* against the one, and another kinde of execution against the other, because though they be two severall persons, yet they make but one debtor when I sue them jointly, but if I sue them severally, I may sever them in their kindes of execution; for though the Obligation be but one, yet the originalls, the suits, pleadings, judgements and executions are so divers, as if they were upon severall Obligations. But yet so as if once a very satisfaction be had of one, or against the Sheriffe upon an escape of one, the rest may be relieved upon an *Audita Querela*.

Severall kinds of executions upon one obligation as a *Capias* against another where they are not sued jointly, *Quare* if I sue them by one writ but severall precepts

But now, singling out the very point, I hold that a *Capias ad satisfaciend.* is against that party as not onely an execution, but a full satisfaction by force and Act and judgement of Law, so as against him he can have no other, nor against his heirs or executors, for these make but one person in law.

For where the law gives three or foure kindes of executions not all together, but by way of choice, whereof the *Capias ad satisfaciend.* is one; and when the body is taken, it is a full execution, and cannot be for part, as a *Fieri fac.* may be. It is an election of that kinde of execution, and so a renouncing of the rest as well as an *Elegit*, though it use not the very word &c. for if the Defendant had lands and goods when the plaintiff took the body, he made a plaine preferment of that execution before the other. And if they came after, hee prevented his choyce by this, which expedition alone is a great advantage in execution.

1. Reason:

And it is especially to be noted, that the debtor hath not the choyce to put the creditor upon the execution; for then it had some colour of reason but the choyce is taken by the creditor.

## 2. Reason.

If the party in execution escape of his owne wrong, yet the plaintife cannot have againſt him any other kinde of execution, nor againſt his executoꝝ, whereof the reason is, becauſe, that when he hath begun, and choſen the body, he can never reſort to any other execution againſt the ſelfe ſame party; but the reason is not becauſe he hath an action againſt the Sheriffe, ſo; ſo he hath in the former caſe of ſeverall execution againſt ſeverall debtors by one Obligation, as well after as befoꝛe the escape.

And therefore, if he take one in execution who escapes, hee hath choice to take another, oꝛ to get ſatisfaction from the Sheriffe upon the escape.

But now as to the party himſelfe, though he make an escape (which is his owne wilfull wrong) yet the plaintife can have no other execution againſt him. And if he ſaith he hath remedy againſt the Sheriffe, yet that may faile, either by death, oꝛ diſability of the Sheriffe. And by the ſame reason, that there is difference between the ſame party and another in caſe of escape, I hold it much more reaſonable in caſe of death 41 aff. Pl. 15. One in execution ſo; debt escaped, and the Sheriffe dyed, whereupon the plaintife prayed a new *Capias* againſt the priſoner, and had it in that caſe of miſchiefe, but other execution I hold hee could not have had in that caſe.

When the party taken in execution makes a wilfull escape, and that againſt the keepers will, yet the plaintife can take no other execution; this cannot be in the favour of the priſoner, ſo; he is the onely wrong doer both to the parties and to the Law, and is the cauſe why that execution is defrauded, and ſo gives cauſe of another.

There is no cauſe to impute any fault to the plaintife, why he may not now take a new execution, ſince by the defendants fraud hee could not reape the benefit of this.

Likewiſe there is no cauſe to quit the offendor and to lay the charge upon the Sheriffe who conſented not to the escape, whom the plaintife would free by taking another execution againſt the party himſelfe.

Therefore there can be no other reason of that poſition, but that the *Capias* executed, and the body taken, ſtops, as againſt him all other executions but it ſelfe and the conſequence of it, which is the action of debt, oꝛ action upon the caſe upon the escape.

Now in the principall caſe, all theſe conſiderations move mainly, and are without exception more cleare and juſt to quit the defendant, being in no fault, and to ſatisfie the plaintife by his owne choice, whereof he hath had the full effect direclly, that is, his body.

## 3. Reason.

It is a Privilege to the King, to have execution of body, lands and goods, not communicated to the ſubject, but in caſe of Stat. Merchant and Staple: and Recognizances of that nature, which is by Statute law. And therefore the caſe put in Blomfields caſe; That where the party was taken in execution upon a Statute and dyed, and yet execution was had againſt goods and lands after, is nothing in this caſe, ſo; they were all due at the firſt, and therefore might be taken at once oꝛ ſeverally. But if this opinion ſhould hold, a man, beginning with a *Capias*, may be ſure upon death, to end with a *Fieri fac.* oꝛ *Elegit.*

And ſo if many be bound and all taken in execution, upon the death of every one a new execution may be againſt the executor; which is abſurd and full of miſchiefe.

## 4. Reason.

*Statutum est  
omnibus semel  
mori.*

When the plaintife tooke him in execution, as he choſe that his beſt remedy, ſo hee could not but ſee that he might die under his hand, ſo it was his folly to chooſe that kinde of execution which was *executio caduca*.

The beſt by Law is *optimum animal in rei veritate*, but if the Lord will, he may take the worſt. And as it was ſaid by a father that loſt his ſonne in battell, *Novi me genuiſſe mortalem*, ſo here Foſter may ſay *novi me cepiſſe mortalem*.

## 5. Reason.

Now, ſince the execution of the body ſtands as a ſatisfaction between the ſame parties while the party lives, there is no ſenſe but that the party preſerving himſelfe

himselfe to the execution, and ending his life in it, and the other accepting it, and so both agreeing upon it, it should make a small discharge touching himselfe; for it cannot be truly said, that the defendant is in fault, when being not able to pay his debt instantly he yields his body and lands and goods, if he have any, to the course of Law and his creditors choice, and endures with patience without sight or escape after the creditor chose his body: For, it is a phansy, to say, the debtor ought to pay his debt, for the law must be the same, whether he were able to pay or not.

The example of the fellow servant that made his suite, Have patience with me and I will pay thee all.

And of all executions, that of the body is in law esteemed the best, as also in law of nature the best, and most forcible, and therefore, 7 H. 6. 6. by the opinion of Cotismore, if two Creditors have judgement, and the one pray a *Capias*, and the other a *Fieri fac.* the *Capias* shall be awarded as best for the Debtor. And the Common law gave not that execution, as being too hard and heaveie, but onely in the case of willfull wrong, *vi & armis*, for which none was thought too hard. And therefore Barons were not subject to it, but upon great contempts; nor yet, since the Statute, 25 E. 3. though they be not specially exempted.

6. Reason;

Though the plaintife have no direct interest in the body as in his ward or villain to buy or sell it, yet he hath interest in it for liberty or restraint by ward, till he pay *ultimum quadrantem in salva & arcta custodia*. Reade the case in the 4. Chap. of the second booke of Kings, the creditor would take the two sonnes to bond-men.

Although in trespass *vi & armis* at the Common law against a Baron a *Capias* lyeth not, nor after by the equity of the Common law upon the Statute, because the estate of a Baron is intended sufficient: yet 11 H. 4. 15. in *homine replegiando*, against Dame Spencer a Peere of the Realme, viz a Baronesse hozn, it was granted, because it was an high injury to the person whom she elogned. Also the common law holdeth the body the greatest paine and highest coercion.

And the reason is apparent, for as Christ saith: The body is of more worth then rayment. And as it is said in Job, *Pellis pro pelle*, and all that a man hath he will give for his life, but touch his flesh or his bones, &c. Now imprisonment toucheth both in *salva & arcta custodia*.

Now touching the case that is agreed, 14 H. 4. 4. 15 E. 4. 10. That where a man takes distresse for a rent, and upon a towry hath retaine irreplevisable, that if the beast die in the pound, that now hee may distraine a new, and that he should much couvince the case in question: He that looks neere unto it shall finde it nothing like; for besides that, there is no comparison between the body of a man and a beast, touching valuation, and so touching satisfaction, it is to be noted that the summe of rent, or the valuation of the damage is not adjudged to the Aowant in the *Replevin*, and then the beast taken by him in execution as in the case in question but where hee had taken the beast by distresse, and that is replevied from him. Now upon the right of distraining appearing, the beasts are restored unto him, in that state as they were before, to remaine with him as a distresse lawfully taken by judgement of the Court and not to be replevied, so this hath no colour of an execution, but is onely the effect of the agreement of the parties, or act of Law; be it in rent service, or rent charge, or damage lesant, that he may distraine and retaine, till the rent or damage be satisfied, so that even as if the beast had dyed before judgement he might have distrained againe, so after judgement, for it is alike in both cases.

It is more fit comparison to speake of beasts taken in execution by *fiar fac.* and dying, though there be a property which is not in the body of of a freeman.

But the body of a freeman cannot be made subject to distresse or imprisonment by Contract, but onely by judgement.

But in this case the debt is adjudged, and the body taken by a warrant of the Court, and of the law in execution for it.

Pasch. 43. Eliz. Rot. 88. Anne Williams brings a *Scire fac.* against Edmond scire fac. Cuttreyes, and Constance his wife, Administratrix of Richard Lambe, to have execution of 88 pound debt and damages recovered against Lambe. The defendants pleaded, that the plaintife by *Capias ad satisfaciendum*, had taken Lambe



A man dyes in execution his administrators are no further Chargeable.

Starchamber.  
Perjurie not  
legally yet pun-  
ished. In Star-  
chamber,

Lambe himselfe in execution, in which execution he dyed, and demanded judge-  
ment, and then demurred Hil. 4 Jac. It was adjudged against the plaintiffe  
in the Kings Bench, which was long after Blomfields case either argued or  
published, it being argued 38, 39 Eliz. and published *Tertio Jacobi*.

Spicer and Read. Trin. Terme.

Ann. 13 Jac. Regis.

**M**After William Spicer was sentenced in Starchamber, at the suit of  
Thomas Read Esquire to 400 pound fine, for that he had taken Oath be-  
fore Baron Snig, according to the order, taken upon the Commission for defe-  
at the titles, That John Spicer his Father was seised of a manor of some estate  
of inheritance, if his Majesties title hinder not, whereas in truth the manor  
was then the said Reads, and so obtained the letters Patents from the King:  
but this was punished, not as a direct and iudiciall Perjury, but as a misdemea-  
nor in abuse of the Kings gracions Commission to the disturbance of possessions,  
which was instituted and intended for the quieting of possessions, in supply  
and imitation of the Statute of 32 H. 8. cap. 9. whereby men are forbidden to  
buy and sell Titles, saving to such as are in possession of the lands. And be-  
cause Read the plaintiffe had been fined and troubled by colour of his new Patent,  
100. markes damages was given to him, and the sentence ordered to be published  
through the kingdome.

Starchamber.  
Breaking an  
house upon  
private proces.

Parke and Percivall versus Evans underbayliffe.

Sheriffe fined  
for outrage in  
executing pro-  
ces.

**H**ugh Evans an underbayliffe of Steepne and others, were fined at the suit of  
Parke and Percivall in two hundred pound a peece, for that they upon a  
private proces at the suit of one Brocklesbury against one Porter, who lay in  
the house of Parke, came and knockt at Parkes dooze, whereupon Parkes Wille  
came to the dooze, and opened it a little to see who was there, and they presently  
with their swords drawn, rusht in upon her whether shes would or no, and bare  
her downe and brake open the Chamber dooze, where Porter lay, and brake also  
Percivals house adjoining to it, to get instruments to brake doozes withall,  
and did hurt divers in the house. And my Lord [chiefe Baron] and [my selfe]  
held the first entry unlawfull, for the opening of the dooze was occasioned by  
them by craft, and then used to the violence which they intended.

Starchamber.  
Libel by privy  
letter to the  
party himselfe.

Barrow against Lewellin.

**P**aul Barrow preferred a Bill in the Starchamber against Maurice Lewellin,  
for writing unto him a despightfull and reproachfull letter, which for ought  
appeared to the Court, was sealed and delivered to his owne hands, and never  
otherwise published. And it was resolved that though the plaintiffe, in this case  
could not have an action of the case; because it was not published, and therefore  
could not be to his defamation, without his owne fault of divulging of it. And  
all Actions of that kind doe suppose in *auditu quam plurimorum pro palavi*, &c.  
Yet the Starchamber for the King, doth take knowledge of such cases and  
punish them, whereof the reason is, that such quarrellous letters tend to the  
breach of the peace, and to the stirring of Challenges and quarrells, and there-  
fore the meanes of such evils as well as the end are to be prevented.

Martin

Martin versus Marshall and Key.

False imprisonment.  
Co. B.  
Court of  
Chancery at  
Yorke whe-  
ther it may be  
by prescription.

Martin brought an Action of false imprisonment against Marshall and Key, who justified and said, that Yorke was a Citty by prescription incorpo- rate, by the name of Mayor, Aldermen and Communaltie, and that they had had time out of minde, a Court called a Chancery Court for all causes of equity arising within the Citty, between Citizens, to heare and determine by bill and answer. And that the Mayor had alwayes used to direct precepts for appearance and contempt of orders, and to imprison for contempts of orders, and to proceed according to the course of Chancery; and then shewes that another one Marshall proffered a bill before Marshall the now defendant being then Mayor, and the Aldermen, and tells the effect, whereupon the defendant being summoned, appeared but would not answer, and thereupon an Order was made against him, that hee should answer or be committed; and because he did wilfully still refuse to answer, commandement was given by the Mayor to Key the other defendant, being Serjeant at Law to take him; who did so, and brought him into the Court before the Mayor and Aldermen, where he was in open Court committed for his contempt, which taking and committing was the same imprisonment; whereupon the plaintiffe demurred, and it was adjudged against the defendants upon one grosse fault; that where the prescription was for precepts to be directed (which must be understood by writing) the precept to Key the defendant, was whereby the plaintiffe was taken was by word. And if that were void, which is made part of the Cause of the judgement, the whole plea is vicious, though the committing in open Court were good.

But in the handling of this case it was argued by Serjeant Hitcham that the substance of the plea was faulty, for he argued that a Court of equity could not be in grant, much lesse in prescription being a jurisdiction to be derived from the Crowne, and so he said it was resolved by Popham, Anderson, Gawdy and Walmesley, that the King could not grant to the now Queens to hold a Court of Equity, and that also it could not be by prescription, for the King cannot grant any thing in derogation of the Common law, but *tenero placita*, according to the course of law may be granted and prescribed, and the Chancery in Chester and Durham are incidents to a County Palatine which had *Iura regalia*. And London and the Cinque Ports have Acts of Parliament for them. And indeed I hold this to be a great question, and of great consideration to be admitted, that a Court of equity should stand upon grant or prescription only. for though it be true that the Court of Chancery hath alwayes been, and so in effect stands by a prescription, yet that is not well reasoned, for in pleading of any thing done in Chancery, you doe not begin your plea with a prescription, as in these inferiour pretended Courts, but you pleade a thing done in the Court of Chancery as you doe all things done in the Courts of Common pleas, or Kings Bench: whereof the reason is, that they are fundamentall Courts, as ancient as the kingdomes it selfe, and knowne to the law, for all kingdomes in their constitution are furnished with the power of Justice both according to the rule of law and equity, both which being in the King as Sovereigne, were asserted in severall Courts, as the right being first made by God was after settled in the great bodies of the Sonne and Moone. But that part of equity being opposit to regular law, and in a manner an arbitrary disposition is still administered by the King himselfe and his Chancelor, in his name *ab initio*, as a speciall trust committed to the King, and not by him to be committed to any other. And it is true, that the one is bound to rules, the other absolute and unlimited, though out of discretion they entertaine some formes which they may justly take in speciall cases.

Arundel

## Arundels Case. Replevin.

Vine from  
two places in  
respect of two  
defendants.

**I**n a Replevin by Arundell against two for taking his Beasts at a place called Horsedowne in Southwarke, one of the defendants pleaded *non cepit*, whereupon issue was taken, the other pleaded that the place where &c. lay in the Parish of S. Olaves in Southwarke, and was the Freehold of the Governours of the Schoole of S. Olaves, and so made cognizance. The plaintife replied, claiming a way over the place, to another place in the same Parish, and issue taken upon that prescription. And one *venire fac.* was awarded for trial of both issues from Southwarke and the Parish of S. Olaves. It was excepted that it should have been only *de vicineto parochia*, because the place appears to lye there, and therefore that was the neereſt *venue* to the fact. But the Court ruled the *venue* well, for though it ought to have been so, if both the defendants had joyned in the plea of prescription, because that then they had both agreed that it had lien in the Parish, yet because the one issue was *non cepit* to the place, as it was laid in Southwarke generally, and he was not bound by his fellows confession that it lay in the Parish, and there was but one *ven. fac.* therefore that must sit both their cases, which was to have it both from Southwarke, and from the Parish in Southwarke, and it was also ruled that it is not to be shewed that the Governours were incorporated, for it shall be presumed by the plea, 19 H. 6. 80. though 20 E. 4. 2. where one brought debt by name of Alderman as successor, he otherwise for a succession in one person of chattels will not be presumed without speciall allegation. except in case of abbot or priore, or the like corporation knowne in law to rest in one person as well for chattels as inheritances, for otherwise Bishops Deanes, Parsons, Vicars, & the like cannot take obligations to them and their successors, but they will go to the executors. And Lisney in the *Habeas corpus* was made Lisney to agree with the *ven. fac.* though the true name was Lisney, because they sound so alike.

Plea of Corporation without shewing the creation of it, v. 9 E. 3. 19 chapter sans Dean, 22 ass 67 Commonalty sans major, 7 E. 4. 19. probis hominibus.

Replevin.

Johnson versus Throughgood. Trin. 12,  
Jac. Ror. 1734.

Goldborough.

Election in issue for sundry formes, Prescription to tether Horses.

**I**n a Replevin by Johnson against Throughgood issue was taken whether one and all whole estate he had in a spane, had used to tether their horses to stakes in a place called the Brook, *ab eo post festum Pent. annuatim*; and the verdict found that they had used to doe so in *vigil*; *Pentecostes in festo Pentecostes die luna in septimana Pentecostes, aut postea ad suum libitum annuatim*. And it was adjudged for the Parson that did prescribe, and that the verdict did maintaine the prescription as it was pleaded, because it was moze large, and also gave a choice;

Webb.

Award proces to the Coroner or Sheriffe cross.

**A**ction was brought by A. B. against Webb, and issue joyned. and then the plaintife made surmise, that he was Baptiste and servant unto Grimstone, the Sheriffe of Essex, and therefore prayed processe &c. to the Coroners, which being confessed, the entry was *& ei conceditur*. And yet afterwards the *venire fac.* went to the Sheriffe, and the Jury pass for the plaintife. And this was moved in arrest of judgement by Serjeant Towse, and the question was whether this grant to the Coroners being meerely in favour of the plaintife to avoid his delay by challenge, may not as well be left after it is granted, as before have been required at the first.

But whether this be not a misawarding of proces remedied by the statute of Jeoffailles,



## Greene versus Armesteed. Trin. 12.

Jac. Rot. 1703.

Norfolk  
Goldsborough.

**I**n trespass by Robert Greene against William Armesteed for lands in Clay, the case was thus, That Raph Greene had issue William, and William had issue Robert the plaintife, and Thomas his younger sonne, and being seised of these lands in Clay, and of certaine lands in Stukey, did make his will concerning the same as followeth. Item, I will that William Greene my sonne shall have my house and land in Clay for the terme of his naturall life, and then to remaine to Thomas Greene his sonne, except the said William Greene doe purchase another house with so much land, and so good in value as the said house and land in Clay, for the said Thomas his sonne, and then the said William shall sell the said house and lands in Clay as his owne. And the said Thomas Greene shall pay 10 pound to be paid to his sisters 10 pound of good English money in some following, that is to say, to each of them 20 shillings by the yeare, untill the said summe of 10 pound be fully contented and paid to the sisters.

Item, I give my land and house in Stukey and elsewhere to Richard Manser for terme of his life, and then to remaine to Robert Greene and the heires males of his body, and for default of such issue to Thomas, and he to pay 40 pound to the children of Robert. The onely question was, whether Thomas under whom the defendant claimes, tooke a fee-simple in the lands of Clay, or but for terme of his life, for William purchased no other lands for him, and both William and Thomas are dead, and it was adjudged without difficulty that hee tooke a fee-simple after the death of William; for though the first words taken by themselves would have given him but an estate for life, yet the word [purchase] in the second clause imports in common speech an absolute purchase in fee, though a purchase may be also for life; as fee imports fee-simple, and the feast of Saint Michael the most notorious and eminent feast, except it be otherwise specified. And therefore if a man appoint his executors to purchase 100 pound land for a younger sonne, no doubt it will import a fee-simple. Also he saies that if William purchase, then he shall sell the land in Clay as his owne, that is, he shall have power to sell them then, and not before: whereas if Thomas took an estate but for life, he might have sold them before as his owne.

Again, he was appointed to purchase other house and land of as good value (not pecuniary value) as the house and land in Clay. Now the value of the land according to the value of the whole estate. And so it is apparent that the meaning was, that he should have the one land of as good value and estate as the other. And that appeared also in that he was to pay the tenne pound yearly. And it was urged, that the payment of tenne pounds did also import a fee-simple, which were cleare, if the will be understood, that he should pay his twenty shillings a yeare, from the death of the Testator before his estate fell in possession. But because I rather take the meaning otherwise, the paying of twenty shillings yearly, could be no perill unto him, because if his estate should cease, he would cease his payment, otherwise if he had been to pay his tenne pounds at once, but yet it would have made the legacies of twenty shillings a yeare unto the daughters uncertaine, which the testator made certaine, for otherwise he would have said, that he should have paid it by twenty shillings a yeare, if the estate came to him, and they live so long. And for the other clause it was holden clearely, that although it spake of the lands in Stukey, or elsewhere, that [elsewhere] can never extend to the lands in Clay upon all the parts of the will, as before, though hee have no lands but in Clay and Stukey. But the word [elsewhere] shall be rather surplusage and void, then by such a loose word to alter a large, plaine, and particular devise before.

Devise expressed shall not be altered by doubtfull words.

Cocke versus Iennor. Trespasse.

Release to one  
 trespassor  
 discharged  
 alibi

Thomas Cocke brought an action of trespass against Kenelme Jennor for breaking his house at Dunmow, and beating him the last day of October, in the tenth year of the King. The defendant pleads that he together with one Robert Milborne in the time of the trespass supposed, did jointly break the plaintiffs house, and beat him; and that afterwards, on the thirteenth day of June 17 Jac. R. the plaintiffe did release unto the said Milborne by his writing, with the defendant thewes in Court, all actions real and personal, &c. and avowed that the trespass wherof the plaintiffe complains, and to which he and Milbourne did jointly *est nisi & eadem; & non alia neque diversa*. Whereupon the plaintiffe demurred, and it was adjudged for the defendant, for though a trespass be joint, and severall to this purpose that he may sue either one or all, yet when two joine in a trespass, they so make one trespasser as either of them is as well answerable for his fellowes fact as for himselfe. And therefore a release to one discharge the whole trespass. And also a release is as good a satisfaction in law as a satisfaction indeed; And therefore if an executor release, the debt released is judged assets in his hand. Now against joint trespassers, there can be but one satisfaction, and therefore if they be sued in one action, though then may sever in Pleas and issues, yet one Jury shall assess damages for all. And as to the damages, be that is no party to the issue, shall have an attaint as well as his fellowes, and if they be sued in severall actions, though the plaintiff may make choice of the best damage, yet when he hath taken one satisfaction he can take no more, and if he require two, an *audere Quer.* will lie.

Co. B.

Trespasse.

*Venire, fac. awarded ad tri-  
 andum exitum;*  
 where there  
 are divers  
 issues.

Ledsham against Rowe and Mudge.

Thomas Ledsham brought an action of trespass, against John Rowe and Christopher Mudge, for imprisoning of him five dayes, John pleaded not guilty to four dayes, whereupon issue, and to the other day justification, and thereupon another issue. And then Christopher divided his pleas in the manner into two, whereof the latter was a justification, and thereupon issue taken, and then followes the Award of the *Ven. fac.* in these words, *Idem quoad triandum exitum ipsum quam predictum alium exitum inter predictum Thomam & prefatum Iohan. Rowe superius mentionat. preceptum est vic. &c.* And it was excepted, that this Award was insufficient, as being uncertaine, and could not be applied to all, though the Jury had given verdict for all, but it was ruled good because *exitum* may respectuely serve for all, *reddendo singula singulis*.

Consultation.  
 Warwick.  
 Church and  
 Chappell the  
 precincts and  
 separations.

Parish of Aston versus Castle Birmidge Chappell.

The case was in the County of Warwicke that there was a Parish called Aston, and a Parish Church there; there was also in the same Parish a Chappell called Castle Birmidge Chappell, and a certaine precinct called Castle Birmidge. The inhabitants wherof did resort to the Chappell, and there married, Christened and received Sacraments and sacramentalls, and had Churchwardens there, and a perambulation there of it selfe, but they buried not there, but at Aston, for the Parsonage was appropriate, and the Vicar found them a Curate at his Charge, & serves them at the Chappell. Now the Church of Aston being in decay, the parishioners of Castle Birmidge were taxed towards the reparation thereof with the rest of the Parish of Aston, and obtained a Prohibition upon writ, that there was a Chappell parochiall, and that they alone had used time out of mind, to repaire that at their owne charge, and by reason thereof had bene discharged of the reparation of Aston Church, yet in their Prohibition they confessed they were within the Parish of Aston, and that they buried

layed there. Now motion was made for a consultation, and day given to both parties, and being heard it appeared to be as before, saying that there was issue upon the behalfs of Aston the defendant in the Ecclesiastical Court, one in the 16. of Eliz. whereby the parishioners of the Chappell, were sentenced to pay towards the reparation of the Church; and another in the 30. of Queen Elizabeth, whereby they were sentenced, to leave the Office of Churchwardens, at the Church of Aston. And now where there were five sentences on the contrary, on the behalfs of the parishioners of the Chappell, they were all by statute disarmed; whereupon the Court awarded a consultation, for though the sentence were matter of fact, and triable by Jury, yet it is in the discretion of the Court to deny a Prohibition; when it appears unto them that the same is not true, and especially in a Case of this nature, when the delay of reparation may turn to a small decay of the Church; and the intolerable charge of the parishioners being in repairing and in suit; for the suit in this case had cost (as was said) three hundred pounds. Now it was apparent to the Court, that they were to all purposes, part of the Parish of Aston; and therefore a Consultation was made to reparation with the rect; For though they had the Chappell for their use, yet they might resort if they would, to the mother church, and the reservation of buriall was a saving of the old right, and no more but the Vicar might serve them in person at their Chappell, as well as in Church. Wherefore, since the people lay on their side of their discharge, and it was ordered to the contrary on the other side, and nothing of theirs, save only in Acquittance in the 11. years of the Queen, that forty Willings was made of them as of Benevolence, and not of duty, made by two men Collected by the reparation; which made the Court nothing, because the King at the time could not change the right, nor bind the Parish. And the same Acquittance appeared to have been pleaded and over-ruled in the Court, in the 16. years of the Queen. Wherefore the Consultation was Awarded as before, yet it was holden, that if the Churches parochiall be united, the reparation shall be severall as before. And in the principall case if the man of Oakthorpe had been time out of mind discharged of the repairs of the Church of Aston, the Prohibition might have layne.

It is in the discretion of the Court, to deny a prohibition.

### Cuddington versus Wilkins.

Cuddington brought an action of the case against Wilkins, for calling him a Heretic; the defendant justified, because before time hee had stolne some part of the plaintiffe's replead, that since the supposed felony the generall pardon in the seventh years of the King was made, and makes the usual atterment being himselfe within the pardon. Whereupon the defendant demurred; the Stamford Plac. Coram 180. That if a man arrested for felony, breaks Prison he shall lose his battaile, but yet if the King pardon him that it is restored. F. Coram 281. 1 & 2 E. 3 F. Coram 154. to save the felony is by the pardon effaced.

And in the end this case was adjudged for the plaintiffe, thought may be, he knew him not to be within the pardon; for there is no cause to favour false and injurious words; But perhaps if he had arrested him for the felony after pardon, it might have been excused if we know it not, because it is an act of Justice. vide residuum infra fol.

### Worthington versus Garstone:

Kings Bench.

Mich. 23 & 23. El. B. R. Rot. 378. William Worthington brought an action of the Case in the Kings Bench against John Garstone, and declared that where he at the request of the defendant, did sollicite and procure an action of trespass, between the said Garstone plaintiffe, and John Saunders defendant: the said Garstone did promise to pay to the said Worthington one hundred



Solicitor  
brings an action for a  
summe promised for soliciting.

hundred pound; the defendant pleaded, that hee made no such promise, and it was found for the plaintiffe, and assessed damages to seventy pound, and now it was alleged in Arrest of judgement, that the soliciting and prosecuting of another mans suit, is not lawfull for any, but for an Attorney, or Counselor at law. But the Court did agree without argument (Wray being absent) that it is lawfull to be a Solicitor, if it be not for maintenance, or that hee lay not money out for maintenance.

Co. B.  
Assumpsit.

**John Richards versus Math. Carvamell.**

Brownlowe.

Notice when  
necessary.

**H**ill. 12 Jac. Rot. 790. John Richards brought an Assumpsit against Math. Carvamell an Attorney of the Common pleas. And declared, that whereas he had informed in the Exchequer against one Milton for ingrossing of Coine, and was ready for tryall, that the defendant in Consideration, that the plaintiffe should not proceed to his tryall, but should desist from his proceeding, and should also deliver him a note of his Costs and Charges expended in the suit, did promise to pay him such Charges expended in the suite at the plaintiffes first coming into Somersetshire, and then laid the performance of the Consideration on his part, and that such a day after, and before his action hee came first into Somersetshire, that is to say, to Taunton, and yet the defendant paid him not his Charges being six pound odd money, to which he had disbursed and made known unto him, by his note, delivered (as aforesaid). And upon Non Assumpsit, it was found for the plaintiffe; And it was said in Arrest of judgement, that the plaintiffe ought to have given notice unto the defendant of his first coming into Somersetshire, because it was a thing lying best in his owne notice, and that also because the defendant undertook not the payment by bond, but by Assumpsit only. And to this opinion Warburton agreed.

Ven. fac. forme  
amended.

**Priddy versus Maffie.**

Amendment  
cannot be of  
the roll.

**A**n Ejectione firma was brought by Priddy against Maffie. In arrest of judgement after a verdict, it was shewed that in the ven. fac. the conclusion was, Et habeas ibi hoc bre. omitting nomina juratorum. Also that where but one was put on by tales, the title of addition was nomina juratorum, &c. And yet judgement was given for the plaintiffe, for the ven. fac. is warranted, and must be amended by the roll, and the other exception is nothing.

Debr.

**Leicester against Sir William Reade.**

Testatum  
requisite upon  
the roll.

**L**eicester brought an action of 500 pounds debt, against Sir William Reade, Las Executor, in London, de bonis testatoris, and 5 pounds damages, de bonis propriis, si non, &c. upon Fieri fac. into London, the Sherffes return that he had wasted the goods, and that he had no goods of his owne. Whereupon Leicester took a Fieri fac. against him into Durham de bonis propriis, and the writ was quod testatum est, that he had goods there, but indeed there was no testatum on the Roll, nor warrant for the writ. Whereupon a supersedeas was awarded, and an execution upon that writ made, by a sale of a lease discharged. And it was a case of great extremity prosecuted by Leicester against conscience.

Brownlow.

**Sir Richard Lovelace and his Wife  
against Arthure Cocker.**

New bond given  
discharged not another.

**M**ich. 6. Jac. Rot. 1001. Sir Richard Lovelace and his Wife, brought an action of debt upon an obligation of an 100 pounds, made to her, when she was sole, for the payment of 52 pounds 10 Shillings, by Arthure Cocker the defendant, who pleaded that at the day of payment of the 52 pounds 10 Shillings, he and such an one his sonne did make a new bond of another 100 pound, so the said

and wife, being then also sold for the payment of the same 52 pounds 10 shillings at another day then to come in full satisfaction of the said 52 pounds 10 shillings, and that she so accepted it, whereupon it was demurred, and moved for the plaintiffe, for it was holden no satisfaction at all and present as ought to be.

*Rawden versus Strut.*

**T**R. 13 Jac. Rot. 1017. Rawden brought an action of debt against one Strut, upon an obligation for payment of a lesser summe. And the defendant pleaded a new bond given at the day in full satisfaction, and so accepted in the former case, but the plaintiffe did not demur upon the plea, but took that it was not accepted, &c. And by verdict it was found against the plaintiffe. And yet Hutton for the plaintiffe prayed judgement, because the bond whereupon the action was brought, and the action it selfe was denied, but as was confessed, and the plea to discharge it was none in law. And resembled it to the case of 9 H. 6. 37. but it was said on the other side that by the Stat. 12 Ed. 8. of Jeoffailes judgement ought to be given for the defendant, according to the verdict. Note that the case was mistaken by Hutton, for the plaintiffe was nonsuit before verdict.

Verdict that new bond was given for another, whether this amount to a confession of the action.

*Boothby versus Bailly.*

**B**oothby an Executor of Gilbert, brought a Prohibition against Bailly and this summe was, that whereas Sir Barnard Whetston was seised of the manor of Woodford Hall, and that he and those whose estate he hath in the same, wanted time out of minde to have a peculiar Pew in the body of the Church, so that the defendant by suit in the Ecclesiasticall Court, sought to dispossesse him of the same.

Pew in the body of the Church.

And by the opinion of the whole Court, this was no sufficient ground of prohibition: for though the Church and Church-yard be in law the soyle and hold of the Parson, yet the use of the body of the Church, and the repairs and maintenance of it is common to all the parishioners. And for avoiding of confusion, the distribution and disposing of seats and charges of repairs belong to the Ordinary, and therefore no man can challenge a peculiar seat without a special reason. But if it had been prescribed, that Sir Barnard Whetston, &c. should time out of mind at their owne onely costs to maintaine that Pew, and had therefore had the sole use of it, the prescription might have stood, and been warrant for a Prohibition, though the Pew were in the body of the Church. And so it is in the like case of an Ale or Chappell adjoining to the body of the Church upon the same difference, whether it have been maintained by the whole Parish, or by some particular persons, like unto the reasons of a Chappell of ease.

The Court shall judge by discretion, the convenience of things uncertaine.

*Austin versus Jervoyse.*

**T**Rin. 13 Jac. Rot. 2180. John Austin being within age brought an Assumpsit by prochein Amy, against Jervoyse, and declared whereas he bought of the defendant a Horse for a piece of gold of 22. shillings paid in hand, and for 11. pounds more to be paid at the death of the said John for which he should become bound with sufficient surety by their writing Obligation. The defendant in consideration thereof promised to deliver him the Horse when he should be required, and says that afterwards he offered to become bound to him, but says not by his writing Obligation, with a sufficient surety for the payment of the said 11. pounds (as aforesaid) but yet he hath not delivered him the horse, though he were required.

Assumpsit. Assumpsit to give bonds for 11 pound, not saying what summe, Residuum infra.

The sum non Assumpsit, and the verdict for the plaintiffe. But he could not have

have judgement, for he should have tendered the Obligation sealed, he should set downe the summe: that the Court might judge if it were sufficient for the 12. pounds, the surety should have been named.

Check. Cham.  
Trespasse.

H. 11. Jac. B. R.  
Rot. 1355

London.

Discontinu-  
ance judgment  
against one in  
trespasse, and  
nonsuit against  
the other.

### Parker versus Sir Iohn Lawrence, & Nevill, & Wood.

John Parker brought an action of trespass against Sir Iohn Lawrence, and Ione Nevill and Wood, Lawrence pleaded not guilty, whereupon issue, Nevill and Wood made a justification: whereunto the plaintife replied, and thereupon a demurrer joyned hanging the demurrer: the issue was tried against Lawrence, and damages given, and judgement against him. And after judgement the plaintife entered a *Nolle prosequi* against Nevill and Wood, whereupon this being in the Kings Bench, they all brought a writ of error against Parker, in the Exchequer Chamber, and alleged for error, that the *Nolle prosequi* discharged all the defendants, and it was agreed by the Court, that if the *Nolle prosequi* had been before judgement, it had discharged the whole action, and so had it, if judgement had been against them all, and then the plaintife had entered the *Nolle prosequi* against the two as before, for non-suitt or release or other discharge of one discharges the rest. But because in the principall case the action was at an end against Lawrence, and no judgement had against the other two in as they are divided from Lawrence, and are not subject to the damage found against him, it was adjudged that he was not discharged, and in no error.

Note also that it seemes that Nevill and Wood should not have joyned in this writ of error. For there was no judgement against them, nor they grieved.

Note the writ of error, *ead. graue damnum &c.*

Error.

Bayle entered  
last day of the  
Term.  
T. 12 Jac. R.  
B. Rot. 558:

### Lady Plat versus Plummer.

In the Exchequer Chamber in a writ of error, by the Lady Plat against Plummer, it was ruled by the practice of the Kings Bench, that though the defendants bayle be taken and entered but the last day of the terme, and the day be put in before any time that terme is in good enough, yet from the time of the bayle the defendant is answerable, as in *custodia mariscalii*; and not before in strictness of law.

### Lambe versus Wiseman. Error.

Lambe brought a writ of error against Wiseman upon a judgement given against him in the Kings Bench upon an Obligation, then taken upon payment, upon a good excuse the *ven. fac.* was awarded to the Coyners, and verdict found, and judgement for the plaintife. The error assigned was, that where the *ven. fac.* was returned by two Coyners only, and the *Disfringas* by three Coyners, there were at the time of the award and returne of the *ven. fac.* and *Disfringas* 4. and it was agreed that this was at the Common law plaine error, for Coyners as *Spinterna* must all joyn, but as Judges they may divide. But by the statute of Jeoffrailes it was made good by the words of imperfect and insufficient returning of Process by Sheriffs or other Officers: yet the Court was of opinion that if one Sheriff of London make his return without his fellow, that this would not be holpen as being no returne at all, or a returne without the Sheriffs name subscribed, because the Court knowes that one Sheriff there is two persons, but it appeares not to the Court that there are more Coyners.

Verdict reme-  
diesse.

Ven. fac. re-  
turned by two  
of 4 Coyners  
H. 11 Jac.  
Rot. 1036.

Sir



Sir John Sherley Knight, and Dorothy his Wife, late Wife of  
Sir Henry Bowyer against Barbara Wood Widow.

Co. B:

Sir John Sherley Knight and Dorothy his Wife, late Wife of Sir Henry Bowyer, brought a writ of Dower against Barbara Wood widow, of lands in Hartfield, ex Notatione Bowyer quondam viri sui the tenant pleaded that the said Bowyer being seised of the manors of Wilborough in the same County, did make a feoffment thereof to the use of himselfe, and the said Dorothy then his wife, for terms of their lives for the joynture of the said Wife, the rem. to Sir Henry Bowyer, and then dyed. And that the said Dorothy held her in by survivor, claiming her said estate, and so demanded judgement. The demandant replied that before the said feoffment made the said Sir Henry Bowyer, being seised of the said manors, did covenant to stand seised thereof, (by the name of all his lands in Suffex except such as he had devised or should devise by his last will and testament. And in the end of his plea averres that he made no devise thereof) to the use of himselfe in tale, the rem. to his said Wife or terms of life, the rem. to Sir Thomas Hendly in tale, & afterward made the feoffment prout, and then dyed without issue. And that she entered & was seised by force of a Remitter, whereunto the tenant rejoynes that she held her in claiming her estate by the feoffment in joynture, & demands judgement whether against that claime she could be remitted upon which plea the demandants demurred. And Nichols, Winch & my selfe held the tenants plea insufficient but Warberton was of the contrary opinion. And first was held that the Remitter to the woman could not together with her husband was dead without issue, because till then the possession and right did continue together in her. Also was held that because both the estates were made unto her during coverture, that therefore regularly upon the death of her husband she might claime both estates she would, according to the books of Mich. 3. by Eliz. Dier 191. & 18. Eliz. Dier 331. But I speaking last added this addition, that though this were true where the election did concerne no body but her selfe (and so are those two cases there without prejudice to a third person) yet here Hendly was in the remainder by the first conveyance, and not so by the second. And therefore it should be a prejudice to him in his remainder (which rose together with the first estate, and they two together make but (as there) one estate to some purposes, for perhaps upon a grant of reversion it might be otherwise) if the law should not judge her in her Remitter at the first, *volens nolens*. And so is the judgement expressly 41 E. 3. 17. in John Sayes case, and never judgement to the contrary since. And so I hold with Littleton, that when in tale in fee he his sonne within age, and dyed, the issue in tale shall be remitted, being a kinde of third person by the intent of the statute of Westminster the 2. though tempus E. 1. Fitz Remitter 13. the Reporter be of a contrary opinion. Now according to my opinion, a plea of claime by force of the joynture, is always excepted by the necessity of the Remitter wrought by act in law. But if the election be allowed free, yet the claime by force of the joynture was pleaded out of time, and so is idle, and requires no traverse, whereof the reason is plain, for the statute of Westminster hath a generall Purvien. That joyntures made by wives, without distinguishing before or after coverture, shall barre dower, and then comes with a Proviso, that if it be made during coverture, the may waive it and take her dower, which is a kinde of remedy provided for her out of the generallty of the law, and therefore must be pleaded by her. And in this case there appeared nothing to the Court untill the tenant first pleaded of any other estate that the demandant had, but onely the title of dower, and therefore it was in vaine to pleade that she claimed by her joynture, because there appeared no other estate to claime by, like unto the point in the latter end of Walsingham's case, where the averment that Sir Thomas Wyat had issue alive, was holden void. And so there if a man bring an action upon an Obligation by 1. S. and averre

Dower.  
Suffex H. 10.  
Jac. Rot. 819.  
and Tr. 10.  
Jac. Rot. 3803.

Remitter *volens nolens* for benefit of a third person.

Pleas out of time are idle and not traversable.

averre

averre that he was then of full age, or plead a feoffment absolute and without condition, these averrements are out of their place, and therefore void, and so the other party shall plead nonage or condition, and shall not traverse, but be traversed. And this was the maine point wherefore judgement was given for the demandant, because the Remitter and the claime by force of that amounted to a Rescalf of the joynure, and therefore that should have been traversed.

Exception that  
crosseth the  
grant.

Lastly, the exception I held to be void, for there could be no lands at that time devised, because Bowyer was alive, and the exception of such lands, as he should after devise was repugnant, because the covenant was to take effect from the making of the indenture. As if a man should bargain and sell all his land (except such as he should after devise.) And besides, such an exception amounteth to the whole grant or pretendeth to put it in his power to reboke all, and therefore is void, as 18. of Eliz. lib. A. If 1 S. make a lease of all his land in Dale, except the manor of Dale, and he hath no lands there but the manor, the exception is void, and all will passe. But here this point of the case was cleared, because it was averred that this manor was not devised. So judgement was given for the demandants, (Warburton being to the contrary, and a writ of error was brought in the Kings Bench.

Cheeq. chamb.  
Error.

One writ lyeth  
not upon the  
severall judge-  
ments against  
Principall and  
Bayle.

Error out of  
the Kings  
Bench, *Quod  
coram vobis re-  
sides.*

### Forest versus Sir James Sandland Knight.

FRANCIS Forest a French-man, brought an Assumpsit against Sir James Sandland, and one Doctor Tenant was his Baile, and judgement was given in the Kings Bench against the principall, and after by *Scire fac.* against the Baile, and now the principall, and Baile joined in one writ of Error in the Exchequer, and it was abated by judgement, because they could not joine; and it was desired, that the Baile might have a new writ of Error by himselfe, *Quod coram vobis resides*, but it was denyed him, both because the *Scire fac.* is none of the Action, wherein the writ of Error is given in the Exchequer Chamber; And also because the Record doth not abide before these Judges, but in the Kings Bench; yet it was otherwise ruled heretofore, in the case of one Matthewes, but it passed *sub silentio*.

Chequer  
chamber.  
Norfolk T.  
12 Jac. Rot.  
2174. and H.  
11. Jac. Rot.  
301.  
Covenous  
conveyance, is  
no conveyance

Judgement.

### Humberton versus Howgill.

Humberton recovered a debt against Thomas Howgill by judgement who hoped, and upon a *Scire fac.* against the Terretenants, the Sheriffe returned Iohn Howgill Tenant of an house that was his, at the time of judgement in Yarmouth: Iohn Howgill came in and pleaded that Thomas infeofed him long before the judgement in fee *absque hoc*, that he was seized at the time of the judgement or any time after; Whereupon issue was taken, and the Jury found the feoffment, but farther said, that it was made by Cobin, to defraud the plaintife and other Creditors. And it was judged for the plaintife, for Thomas remained still seized, as to the Creditors, notwithstanding the Feoffment. But if the issue had been taken directly infeofed, or not infeofed, it had been found against the plaintife, for in that case he must avoyd the Feoffment by Cobin especially pleaded, for it is a Feoffment *in quel.* As you cannot plead *non est factum* generally upon the Statute of usurie, or the Statute of Sheriffes; But here the issue is generall seized, or not seized by the Feoffment like Gooches Case, Co. lib. 5. fo. 60. And therefore the Cobin may be given in evidence, when the Feoffment is given in evidence.

Chequer  
chamber.  
Lincoln, Tr.  
12 Jac. Rot.  
2077.  
Brownlow.  
Lease misreci-  
ted and yet wel

### Pope versus Skinner. Replevin.

Pope brings a Replevin against Skinner, who avowes the taking as a Commoner, because the plaintiffes beasts, were in the Common dammageasant in April 12 Jac. The plaintife in barre says, That one Williams was seized

which of an house and land &c. Whereunto hee had Common &c. and demised the same unto him, the 30. day of March, in the same 11. yeare, to hold from the feast of the Annunciation, next before so; a yeare. The Defendant traverseth the lease *modo & forma*, whereupon issue was taken, and the Jury said, that Williams made a lease to the plaintiffe, on the 25. day of March so; one yeare, from thence next ensuing; And though this be not the same lease, that the plaintiffe pleaded (so; this begins on the day, and the other begins not so soone) nor to take his limitation, but from the day excluded, yet the Court gave judgement so; the plaintiffe: so; the substance of issue is whether the plaintiffe have a lease or no from Williams, as by forces thereof hee might common at the time, which appeared so; him in this case, and the *Modo* and *forma* in the rest was not materiall, yet it must not depart altogether from the forme of this issue, as if it had been found that hee had right of Common, by a lease from another, as an owner, it would not have served his turne, so; that had been cleared out otherwise, both in matter and forme. Yet it was granted, that if he had declared in *Exhibitionem firmæ* thus, it would have been against him clearly, so; there hee should have recovered the terme, and therefore must make his title truly. Note that in this case, the Jury might have found directly against the plaintiffe *non sumpsit modo & forma*, and could not safely have found a generall verdict so; the plaintiffe, so that the judgement of law upon the verdict is in manner against the verdict.

The verdict found for him indeed against whom it is in shew.

### Curtice's Case.

Out of the Court of Wards, this case: There was an office found by writ *Out Mandamus*, before the Chancellor of Launceston in Cornwall, after the death of one Curtice that hee dyed seized of certain lands (*scilicet quæ, vel de quibus, vel per quæ servitia ignorantur*) whereupon a *Melius Inquirendum* was awarded, naming the place and time of the former inquisition, *virtute brevis de Mandamus*, as that *Ignoramus* of the tenure, and say not that it was found before the Chancellor, and then proceeded *& quia jam accipimus*, that the said lands as some of them were holden of by knights service in chief or otherwise by knights service, *Tibi precipimus* that you shall inquire, whether the said lands as any of them be so holden. The chiefe Baron Tanfeild and J. (Coke absent) were of opinion that the want of *Coram* was well enough, both because it was *virtute brevis*, which must be before the Chancellor, and because there is a *Melius Inquirendum* in the Register so and a *Quæ plura* in Firz. Na. Br. But we had the writ vicious, because in an *Ignoramus* the inquisite of the *Legum* ought to be free and at large, and ought not to be restrained to the Kings Chancery onely, which is both without President and prejudiciall to the truth.

*Melius Inquirendum*: upon an *Ignoramus* ought to be at large.

### Tredwayes Case.

Edward Tredway being the Kings ward of lands, holden of the King by knights service in chief, dyed the Kings ward; and by *Devenerunt* after his death, it was found in the 13 yeare of the King, that Lettice and Elizabeth were his Sisters and heires and both of full age. And that Lettice the elder, in the life of her brother, the ward departed the Realme without licence, to prevent her religious education, and was and remaines a Nun profess at Doway, and that the profits of all the lands, by the Statute of 3. Jacobi cap. 5. belong unto her other Sister Elizabeth.

Cherquer.

The Question was, What shall become of the part of Lettice? and my Lord Chiefe Baron Tanfeild and I agreed clearly, that the moiety of Lettice, as to the state of the land was not forfeited, nor settled in Elizabeth, so; the statute is, that she shall take no benefit by descent, &c. not that she should not take by descent: and then proceeds to shew the meaning thereof, that the said profits during her unconsorty, shall be received by the next of kin, and they also shall be

This case was resolved by Mountague and my selfe for the King, and so published and decreed in the Court of Wards Tr. 15. Jacobi Tanfeild chiefe Baron continuing in the contrary ion.

A

answerable



answerable unto her after her conformity, and therefore this Statute, differs both from the Statute of 5 R. 2. of consenting to ravishing, and 11 H. 7. of discontinuances by women; so that if this were in common lands, we doubt not but that Elizabeth might enter into all, and take the profits by force of the Statute. But now here is a third person, that is, the King, that is interested in the profits till liberty sued, and he is not bound to give liberty to the heiress, till the oath of supremacy be taken: so as the very heiress cannot enter in this case upon the King, nor sue liberty: neither seems it the meaning of this law by general words which are satisfied in other cases to change the former law in this point, either to give the sister power to take that half without liberty, or to sue liberty in her sisters name, without her sisters performing of the due ceremonies, and the profits received by the King, answer the scope of the law, that the Recusant hath them not for her punishment, and not to bestow in ill uses. And make the case, that this were a laic and heiress, I hold, the next of kin can neither require liberty out of the Kings hands, nor enter without liberty. And it is confessed, that if the sister beyond sea were within age, and so in ward to the King, that the other sister coming to full Age, could not demand liberty of that part in her sisters name, during her minority, and yet the words will carry it. And by this construction it shall be better with a Recusant dying the Recusant then abiding here. And it may be made a practise, that the Kings tenant or a Recusant may lend his heiress apparent over, and then the next of kin shall receive the profits, who may perhaps employ them underhand to the use of the heiress in all, or in part, which bargain may easily be made, considering that he is but tenant at will to the heiress that is abroad, who returning and conforming shall both take the land, and recover the mean profits; and so the former Statute viz. 1. Eliz. c. that requires the Oath of Supremacy before liberty, made as well for their punishment, as the Kings profit, detained. And suppose that such a heiress beyond sea shall bargain and sell his land to a stranger, which he may do, since his estate remains (as aforesaid) I hold that the bargain in such cases shall prevaile the next of kin, and also take the land out of his hand if he have entered as in the common cases. But yet I hold clearly that the King in such cases may refuse to give liberty to the bargain, seeing it in the name of the heiress, except he come and take the Oath of Supremacy in his owne person, according to the Law.

### Barnes his Case.

Use in abeyance whether it shall carry the remainder into abeyance.

This was the sole question in the Court of Wards, whether a wife dying by covenant, to the right heiress of a daughter yet alive should so transferre the remainder in abeyance that it should not be as a reversion till in the covenantor, whereof liberty should be sued after his death, because there is no person in being (which is the word of the Statute of uses) in whom the land may vest.

Cherq.

### Knightleys Case.

Richard Knightley was to sue a generall liberty as heiress to his father Edward, and an especial liberty as heiress to his mother the Lady Bevil, and had a special liberty in these words, *Concedimus Richarda Knightley filia & heredi Domina Mar. Bevil, that he without any liberty of his inheritance, or any part thereof may enter into all and singular the manors, &c. Quae fuerunt dictae Domina Mar. Bevil, & de quibus eadem Maria aut aliqua antecessorum suorum R. Knightley cuius haeres ipse est, sicut qualitercunque scilicet diebus quibus obierunt separatim, vel de quibus aliqua persona scilicet fuit ad usum dictae Maria vel aliquorum Antecessorum dicti Richardi Knightley Tanfield.* And I held clearly that upon the construction of the conjunction and coupling of these words this special liberty could be extended no further then to the inheritance of Dame Mary Bevil.

Roy

Roy versus Bishop Norwich.

Co.B.

*In a Quare Impedit*, in the Kings Bench, by the King against the Bishop of Norwich, and one Sacre Incumbent; It was resolved by the Court, that if an Incumbent were guilty of Simony in obtaining a Benefice, that he was not incapable of that Benefice for ever, by the words of the statute, 31 Eliz. which are to be largely expounded. And the case of Sir Arthur Ingram was thereupon remembered, who having bought the office of Treasurer, being an office touching the Kings treasure, was holden by Egerton Lord Chancellor; and Chief Justice, not onely removable for the present, but also for ever incapable of that office by force of the statute of 5 E. 6. though he had a *Non obstante*, for the person being disabled by the statute could not be enabled by the King.

*Quare Impedit*,  
Disablement  
for Simony.

*Non obstante*  
cannot enable  
any person dis-  
abled, nor make  
an heire whose  
blood is cor-  
rupted.  
5 E. 6.

John Sparke against Tho. Purnell.

John Sparke brought an *Ejectione firme* against Thomas Purnell for lands in Leyburn: upon not guilty the case by speciall verdict was found thus. One John Fairman was seised of the lands in question, and of twenty acres of land more in fee, and had issue three sonnes, James, William, and Anthony, and by his will gave to William his second sonne ten acres of the twenty, and to Anthony the other ten acres, and then gave to James his eldest sonne the lands in question, and willed that when James should dye without heires of his body, that William should be his heire, and Anthony should have his part; and if either the said William or Anthony should dye, that then one of them should be the others heire, as they lived. When James dyed without issue, then dyed William, leaving issue Robert, under whom the defendant claimed, upon whom Anthony entred and took the lease, upon whom the defendant recntred. And it was adjudged that the plaintiff should be barred; for, the last clause that William and Anthony should be one anothers heires, was to be applyed to the first Clause of the division of twenty acres betweene them, (though the gift to James, and so to William in the lands in question came betweene) and could not be applyed to that part, because that last clause was reciprocal for lands, either of them might take from other, which fitted well the twenty acres, because William might take from Anthony by survivor, as well as Anthony from William, which could not be so in the lands given to James, and so to William, for William could take no part of them from Anthony.

Hill, 11 Jac.  
Rot. 692.  
Kanc.  
Waller.  
*Ejectione*.  
Devise.  
Sentences  
transposed to  
serve meaning.

Then touching those, since there was an estate tail given to James, and that by default of issue William should be his heire, that gave William an estate of inheritance, either in fee simple, or such in tail as James had.

For though none can be truly devise, but he that the law makes so, yet there is a devise by appellation and vulgar acceptance, which imitates the state of a true devise. And therefore if by my will I appoynt that J.S. shall be heire of my land, he shall have it in fee, for such estate as the ancestor hath, such he is to inherit. And therefore the said word [heire] in the later clause betweene William and Anthony shall give but an estate for life to the survivor, because the brother to whom he is made heire, had but an estate for terme of life before.

The word heire  
how it shall be  
taken in a Will.

Vernon versus Onslow. Debt.

Vernon brought an action of debt against Onslow upon an Obligation, and demands 80. pounds, and upon Oyer of the Obligation it was found *teneri & firmiter obligari in octogesimo libris*.

P. 12 Jac. Rot.  
2047 alias  
2407.  
*Obligatio* for  
*Obligatio*.

## Bray versus Hayne. Case.

An action for words, for saying, Thou seldest by false measure.

**B**Ray brought an action of the Case against Hayne, and declared, that where he had bene Waplitte to Sir William M. Knight for three yeares last past, of his land in C. and had the selling of his coine and graine, that the defendant had said these words unto him, [Thou art a consenting knave, and thou hast consensd me in selling false measure in my barley, and the Countrey is bound to curse thee for selling with false measures, and I will prove it, & thou hast changed my barley.] Upon not guilty a verdict was found for the plaintiffe.

And yet judgement was given against him that those words beare no action, for every falsehood charged upon a man in his private dealings will not beare action: But if a man of a publick occupation or Trade be charged with deceit in that, it will beare an action. And therefore if this man had bene a common Ridder or Badger, and had bene charged with selling by false measure, it would have borne action. And I was of opinion, and so I am, that if I have a Waplitte, to whom I commit the buying and selling of my coyn and graine, and give him the greater wages, in respect of that trust and employment, and then a man will charge him to have deceived me in his office, by buying and selling by false measure, to my losse or damage, this will beare an action, for this discredit him in his means of living, And this kind of offence may not only be cause to put him out of that service, but to be refused of all others. But that could not be applied to this case, for it doth not appear that these words were spoken of any sale of coine whilst he was Waplit, nor of his Masters coine, nor to the damage of his Master.

## Parker versus Parker.

M. 12 Jac.  
Rot. 547.  
Hil. 12 Jac.  
Rot. 426.  
Amendment cannot be of an imparlance roll.

**P**arker brought an action of the case upon a Trover and conversion against Parker, and the Declaration upon the imparlance Roll had spaces for the day and yeare, of losing, finding, and conversion of the goods, but the issue Roll, and all the rest were perfect in this point.

And the Court was of opinion, that the imparlance Roll could not be amended, and made perfect by the issue Roll, because it was the original, and was to warrant the other, and not *converso*. But yet because upon issue not guilty, verdict was given for the plaintiffe, this Court gave judgement for him, because the declaration, as it was found in the imparlance Roll, was good enough in matter, for the Trover and conversion, was layd in the preterperfect tense, and so before the action brought, and so the fault in the Declaration being but in forme, was holpen by the statute of Jeoffailles.

## Banks versus Parker. Trespasse.

Issue de injuria holpen by the Statute.

**A**n action of trespassse was brought for taking of a Kettle at Westowne, the defendant justified by reason of a Customs in the the *Spanoz* of Tiddeswell, and the plaintiffe joyned *finis de injuria sua propria absque tali causa*. *Edo ven. fac.* was awarded de vicineto de Westowne & Manerio de Tiddeswell by the Roll, and a verdict for the plaintiffe, and though the plaintiffe would not have traversed the cause generally, but the Customs, yet that was judged holpen by the statute of Jeoffailles as matter of forme, because *absque tali causa* contained the Customs and more, but because the Sheriffe had returned his pannell de vicineto de Westowne onely, that was incurable, though it were moved, that the Award was by the Roll de vicineto de Westowne and *Spanoz* both. Also the *ven. fac.* might be amended according to the Roll. It was demped, and resolved for two reasons. First, that it ought not to be from Westowne at all, because the taking was contested on both sides, so that required no tryall, but the cause onely was controverted, which was the customs; and other things arising from the *Spanoz* of Tiddeswell. And though the Roll had been perfect from the *Spanoz* onely

*Viz* must be neither too large nor too strait.



only, (as it ought to have been) so that the *ven. fac.* might have been amended by warrant of it (if nothing had been done upon it) yet now when it appears to the Court, that the writ was not had by such a Jury, as the Roll and the law required, to the prejudice of the truth in them, it ought not to be allowed, and therefore not to be amended. Amendment must not alter truth, and doe wrong.

### Austen verſus Gervas.

In the *Assumpsit* before, by Austen plaintiffe against Gervas, judgement was given against the plaintiffe, because he did not averre, that he did offer the Bond ready sealed, and to deliver the same to the said Gervas, neither did set downe the sum, in which he should be bound for: the same ten pounds, for though it were expressed in the consideration laid only, that he should be bound for: the payment, yet the law required, that he should be bound in a competent sum, which is under the Judgement of the Court, and therefore must be pleaded expressly, that the Court may judge of it.

It was further moved, that the consideration of the money paid in hand by the plaintiffe, being an infant, was void. But to that I answered, that because it was delivered by his owne hands, it was but voidable to be recovered againe by an Action of Account.

### Swinfeilds Case.

Upon occasion of a Prohibition sued by Swinfeild executor of Swinfeild against Ivcatt to the Court of Requests.

Brownloc remembred the Court, that the Prohibitions did not use to stile it in the name of a Court, but did deliver it thus: That the party did preferre a Bill to the Masters of Requests, and therefore it was appointed that the forms should be still observed. Court of Re-quests was so called, and it was not in such a manner, as in some of the old books.

### Adrian Coote verſus Adrian Gilbert. Case.

Adrian Coote brought an action upon the Case against Adrian Gilbert, for slaying. [Thou art a Theefe, and hast stolen a tree.] I was not guilty, and found for the plaintiffe, and yet it was adjudged against him, for the special words, though they come under the word [and] are in common sense to be understood, to be but a verifying and making good of the generall word [Theefe] and then [a tree] shall be understood rather a tree standing then felled, which is wood, and the law craves not to hurt but to heale: Yet Towle cited a judgement in the Kings Bench, 7 Jac. given for the plaintiffe upon these words: [Thou art a Theefe, and hast stolen trees out of J. S. his Orchard, and I have spent one hundred pound, and I will spend another to hang thee.] which case we allowe not, though it were somewhat stronger then the Case at the Barre. Hil. 10 Jac. Rot. 3176. Action for words for saying, Thou art a Theefe, and hast stolen a tree. Exposition of words according to the best sense.

We note, words are taken best for the speaker, yea, and though some cannot find with that construction, as here the word [stolen:] so there is one Rule for words, another for words. Note that.

### Owen an Attorney verſus Mr. Holt of Grays Inn.

Owen an Attorney of this Court sued Master Holt of Grays Inn upon a Bond of eighty pounds; Master Holt exhibited a Bill against him in the Duchy Court, to be relieved in way of equity, pretending that it was made concerning an extent of land, lying within the County Palatine of Chester, and thus made of equity in it: whereupon the Court awarded a Prohibition, because the Duchy Court hath no Jurisdiction in respect of the person, no because the persons suitors dwell within the County Palatine of Chester, nor upon the lands Obligation. Duchy Court their Jurisdiction. Prohibition: the Duchy Court.

lands of the Subject any where, but upon the Kings owne lands, and his owne Revenues, and perhaps upon bonds and assurances given for his revenue of the Duchy. Whereupon Holt being present, finding the opinion of the Court, said he would surcease his suit there without writ. And so the Court compounded the Cause.

## Saint Iohn against Saint Iohn.

Debt.

Action on the Statute 21 H. 6 for not returning one Burgess.

Saint Iohn brought an action of debt, for 500 pounds, against Saint Iohn Burgess of Stockbridge, upon the Statute of 21 H. 6. for not returning him Burgess of the same Towne, for the last intended Parliament. And where the words of the Statute are, that the Sheriffe shall send his precept to the Mayor, if there be no Mayor, then to the Bayliffe: the plaintiffe declared, that the Sheriffe had made his precept unto the Bayliffe, without averring, that there was no Mayor. And now after a verdict for the plaintiffe. This was moved in arrest of judgement; But the Court was of opinion clearly, that it was good, for we shall not intend that there is a Mayor except it be shewed, and if there were one, it should come properly in the other side.

And though the Parliament was as none, because there was no Act, nor Record of it, yet this action may lye, for there was a returne of the writs and many sittings:

Admiralty.

## Don Diego Serviento de Acuna Embassador Lieger for the King of Spaine, against Jolliffe and Tucker, and Sir Richard Bingley.

Prohibition to the Admiralty for cause not done at Sea. Admiralty Court holds Plea of things at land.

Don Diego Serviento de Acuna Embassador Lieger for the King of Spaine libelled in the Admirall Court, as Procurator generall for all his Masters Subjects, against one Jolliffe, and Tucker, and against Sir Richard Bingley for two Ships, and their lading of divers kinds of the goods of the Subjects of the King of Spaine generally, and not naming them *adduct ad Port de Munster*, in the preface of the libell generally against them all, and then proceeds and charged them severally thus: That Jolliffe, and Tucker Captaine, *Pirate in alto mari, more bellico dictas naves aggressi sunt, & per vim & violentiam* took them, and that they were *adducta in partes Hibernia*, and that they came to the hands of Sir Richard Bingley, and he converted them to his owne use (not saying where) and refuseth to render them, being required, &c. Whereupon Sir Richard Bingley prayed a Prohibition, and two dayes were given to the Embassadors Councell: And now Montague the Kings Serjeant, for the Embassadors, said, that he could not sue for these goods at Common law, because he was not proprietor.

Secondly, that Piracy did not change property no more then theft at land.

Thirdly, that the cause begun at Sea, and therefore originally belonged to the Admiralty. But all this notwithstanding, the Court with full and cleare consent, awarded a Prohibition for that part of the suit onely that concerned Sir Richard Bingley, allowing clearly, that they might proceed against Jolliffe and Tucker for that part of the suit, that did distinctly concerne them, because it was layd done upon the high Sea. But because Sir Richard Bingley is not said to have had any hand in the first taking at Sea, but apart by himselfe, in that the goods came after to his hands, and were converted by him to his owne use, which is his particular Charge; that part of the suit belongs not to the Admirals Court: because it is not layd to be done at Sea. Nay more, it is so layd in the libell, as it must needs be understood to be done in the port of Munster, or at land in Ireland; for it is said, that they were brought *ad partes Hibernia*, (not *maris Hibernici*;) so it must be understood upon the continent, and then followes, that they came to Bingleys hands, which must be understood there; no other place being assigned.

Now

Now the whole Court resolved clearly, that the Admiralty of England can have no plea of any contract, but such as riseth upon the Sea: So, though it rise upon any continent, Port, or Haven in the World, out of the Kings Dominions; yet their Jurisdiction is limited by the Statutes to the Seas onely; for the Admirall is for the Sea, and the Court for Maritime Causes. And therefore any Stranger or other will seeke Justice at the hands of the King of England, for wrongs done him out of his Dominions, he must seeke it in those Courts that have Jurisdiction over the Cause. Now if the Cause rise at Land, & in a Port: (so; no Port is part of the Sea, but of the continent,) then he cannot sue in the Admiralty, but he must sue in the Courts of Common Law, which have unlimited power in causes transitory. And then it must be so layd, that it may give Jurisdiction. And this suit against Bingley is no other then a mar action of Trover and Conderfion; as Bawtry and others of the Defendants confessed.

To the first:

The cause being layd at Land no man may by a new found forme of suit, make it ad aliud examen, but he must submit hisoymes to the law, and not

To the second: the originall charge is not Piracy, for though he calles them Pirates, yet the charge of taking the goods is onely *per vim & violentiam*, as to the taking of the goods, and the proceeding is civill, not Criminal. And if it were layd Piracy, All that should come in upon evidence, the Trover and conderfion would be the property, taking and Conderfion. And if it were Piracy proved, yet buying in open market without fraud, would defend the buyer. And now the Question is not, who hath right, but where the right shall be tryed.

To the thirde: Bingleys charge stands by it selfe, as one at land, and [Justice Warburton] said, that the death of a man in great ships, might be tryed either where Judges at land by the common law, or before the Admirall, by the special law in that behalf. And this prohibition was the rather allowed to Bingley, because it was prayed before any proceedings in the Admiralty, further then the libell, which in it selfe warranted the prohibition. Vide *testium infra*.

And note, that the same day Sir John Watts, Captaine Newport, and others, prayd a Prohibition in the case of Monsieur Villiers, Governour of Despe, for a spoyle done at Cape de vert, which they would have desired to have been done at land at Guiney: But because it did not appeare so in the libell, and because they had suffered it to proceed to sentence, it was denyed, and they left to their remedy upon the Statute if there were cause.

Palmer versus Pope.

Admiralty.

Co.B.

M.9 Jac.

Prohibition to the Admiralty.

Palmer libelled in the Admiralty for an agreement made at Sea, for well transporting of Sugars against Pope, and that the agreement was put in writing in Barbary, and that the Sugars were spoiled at Sea: and hereupon a Prohibition was granted; but if the writing had not bene at land, under hand, but a simple remembrance of the Agreement, it had been otherwise: 4 B. 3. 2. F.N.B. 118. g. 10 H.7. Temps E.1. Avowry 192. 8 E. 2. 45 E. 3. 7 R.2. Scatham, 5 H. 6. 2 H. 4. 6 H.6. And the stat. *primus pontis* is onely for death and maim, and Sir John Watts had a Prohibition against Alonso de Valasco Embassadoz of Spaine, for attaching of Lobazco at land here, which one Corvero Subject to the King of Spaine brought hither, and which the Embassadoz libelled to belong to his Master as confiscated, as all other his goods were, for the property of goods here at land must be tryed by the Common Law, how ever the property be guided.

M.9 Jac.

Also, Jennings libelled in the Admiralty against one Audley, upon a contract layd to be made *apud Malaga inter districtam Marii vocat.* The Plaintiffs of Gibraltar *infra jurisdictionem maritimam*: And because it appeared the Contract



Contract was made at the Island of Malega, Prohibition was granted, so; it was not regarded, that he added *infra jurisdictionem maritimam*, which appeared contrary. *Vide infra*.

### Newman versus Moore. Second deliverance.

Southampton,  
Waller.  
Tr. 13 Jac.  
Ror. 3382.

Devise of rent  
of all the land  
holden in  
chief.

Thomas Newman brought a second deliverance against Nicholas Moore for taking his Beasts at Froyle in *quodam loco vocat*. Brocks Close: The defendant avowes the taking, and shewes that Sir Pexall Brocas was seised of the place, *inter alia*, in his demesne as of Fee, and held the same of the late Queene in chief, and so seised, devised a rent of ten pounds a year, out of the said lands to the said Nicholas Moore for terms of his life with a clause of distress, and likewise devised two parts of the land unto the now Pexall Brocas, and the heires of his body, and that he distrained the Beasts of the plaintiffe in the two parts of the said Close. As for the rent behind the plaintiffe confessed the seisin, tenure, and devise, and conveyed the third part to four heires, whereof one Becket was one, and then conveyed the fourth part being the twelfth part of the whole to one Jebson, who demise the twelfth part unto him, by force whereof he was of the twelfth part possessed, and so possessed put in his beasts into the said twelfth part, and the defendant took them.

Traverse, con-  
fession and  
avoidance.

The avowant conveyed unto the said Jebson, as well the two parts devised as the said twelfth part, and then shewes, that Jebson did demise both the one and the other to the plaintiffe, by force whereof he was possessor of both, and so possessed put in his beasts, *absque hoc quod predictus Thomas Newman de pred. 12 parte tenement. pred. cum pertinentiis in Froyl pradiſtantum possessione existens posuit Averia sua pred. in pred. triginta Acres pastura cum pertinentiis, &c. in quibus, &c. sicut idem Thomas superius allegavit*. Hereupon the plaintiff demurred in law, and so; cause of demurrer, shewes that the avowant had both confessed, avowed, and traversed the plaintiffes plea, and also that he had traversed that which the plaintiffe had not allegeded, *scil. the tantum*. And it was without argument ruled, that the devise of the Rent, by the name, out of all the lands, was good as out of the two parts orisely, by the meaning of the statute against the opinion *obiter* in Butlers case and Bakers, as it had bene formerly adjudged upon the same will betwene Eustace Barton plaintiffe, and the same Nicholas Moore avowant in the Common Pleas, Trin. 6 Jac. Reg. Ror. 707. which is the case reported by my Lord Coke lib. 6.

Traverse upon  
traverses.

But so; the forme of the traverse it was argued to be nought, because the avowant had confessed as much as the plaintiffe had pleaded, that is to say, the lease of the twelfth part, and then added the lease of the two parts, which stood well with the plaintiffes plea, and did avoid it, and therefore he should have rested there; and then the traverse should have come on the other side to that lease of the two parts. So; now it was said, that the issue upon this traverse might put the plaintiffe to a mischief, so; if he were possessed of more then of the third part discharged, then so much as he pleads it should be found against him, and yet he were not to be charged. And yet the plea was holden good, and judgement given for the avowant. So; it was shewes to the Court, that in the former case between Barton and Moore, the pleading was altogether the same with this, the same traverse and demurrer, with the cause especially assigned, as it was here, and the point argued, and afterward by the order of the Court overruled and left, and commanded to argue onely the matter in law, which was also adjudged for Moore the avowant, though in the report of the case there is no mention made of this point of the traverse.

Now so; the objection made against this traverse, which makes a Wein, I declared my opinion, that if it had bene found upon issue taken upon the traverse, that the plaintiffe had bene possessed of more then the twelfth part

of the land discharged as of the said third part, or the like, and of no part of the rest of the land charged, that it had been found for the plaintiffe.

For upon the disclosing of the case it appears plainly that the effect and end of the issue is, whether he were possessed only of land discharged, or as well of land charged as discharged, and not of what part of those lands, for that is not the substance, though it be the letter of the issue.

It was also said, that every man shall be presumed to know his owne case, and so it shall be accounted his folly if he have mistaken his part. But yet it was agreed by the whole Court, that the defendant might have rested upon his plea, as a confession and avoidance without the traverse; and that the traverse might better have come on the plaintiffes side.

And therefore I am of opinion, that since the confession and avoidance was of the same effect and consequence with the traverse, and so surplussage, though it were no just cause of demurrer, yet the plaintiffe might have waived that traverse, and maintained his possession of the part discharged, *absque hoc*, that he was possessed of the part charged, *modo & forma prout*, and so the issue would have risen upon his traverse materiall, not upon the others immateriall.

### Stoner versus Gibson: Obligation.

Stoner Administrato<sup>r</sup> plaintiffe against Gibson defendant, in an action of Debt upon an Obligation; The defendant pleaded that the Obligation was with condition for performance of covenants of a deed Poll, and pleaded that he had performed them all, not shewing what they were. Whereupon the plaintiffe demurred in law, and the plea upon the demurres was adjourned to Octab. Mich. last to this Octab. Hillar. at which day the defendant pleaded, but since the last continuance, *scil.* since Octab. Mich. last, from which day the plea was continued till this Octab. Hillar. the plaintiffes administration has revoked and committed to the defendant.

And it was agreed that upon these adjournments and continuances of demurres, the plaintiffe may be nonsuit at the day in another terme, whereunto it is adjourned, and by the same reason he may plead a plea *puis darreine continuance*. And it was also agreed, that if he or the plaintiffe should here take issue, or demurre upon this plea, yet the Court must consider also upon the first demurrer; for if upon that standing confessed by the demurrer the plaintiffe could not have his action, the Court cannot give judgement for him, howsoever the latter issue or demurrer passe. But otherwise it were if the first had been an issue, for then nothing were confessed to his prejudice, and then that had been utterly relinquished by a second issue or demurrer; *Quare.*

Term. Hill. 13.  
Jac. Reg.  
Pleading of  
Covenants in  
a deed poll.

Plea puis dar-  
reine Continu-  
ance after de-  
murrer or issue.

### Cuddington versus Wilkins: Case.

Cuddington brought an action of the case against Wilkins, and declared that Martii 10 Jac. the defendant had spoken to him these words, viz. *He* (meaning the plaintiffe) is a theefe, and why will you take his part? To which the defendant pleaded, that 1 Augusti 36 Eliz. the plaintiffe did steale 6 Sheep from I. S. by force whereof, &c. and so he justifieth them. The plaintiffe by justification saith, that he stole not the Sheep, and pleads the generall pardon 7 Jac. and averres that he is none of the persons excepted. Whereupon the defendant demurred in law. And now this terme it was adjudged for the plaintiffe, for the whole Court were of opinion, that though he were a theefe once, yet when the pardon came, it took away not onely *penam*, but *reatum*, for *scilong contra Coronam & dignitatem Regis*. Now when the King hath discharged him and pardoned him of it, he hath cleared the person of the crime and infamy; wherein no private person is interested but the Common-wealth, whereof he is the head, and in whom all generall wrongs reside, and to whom the reparation of all generall wrongs belongs. And therefore suits for defamation by private

Tr. 13 Jac.  
Rot. 933.  
Calling a man  
theefe after a  
pardon gene-  
ra llor speciall,

private

private persons in Spirituall Courts are pardonable by the King, even after sentence, because though they be sued sometime by the party grieved, yet he is not but in the nature of an Informer, and the sentence is not to give him amends; but *pro salute animæ*, for examples sake. And so are the suits in the Starre-Chamber. And to shew the force of the Kings pardon, the Chief Justice then cited two bookes, 1 & 2 E. 3. Fitz. Corone 281. 154. wherein it is adjudged, that if in an appeale of felony, the defendant doe offer triall by battell, the plaintiffe may counterplead it, by saying the defendant being apprehended, escaped, or brake prison, which presumes a guiltinesse. And yet those bookes are ruled, that if the King pardon that breaking of prison, the defendant shall be restored to the battaille; and the counterplea taken away. And yet the reason of the presumption of the guiltinesse is the same after the pardon as it was before. But the reason of the case is, that the Kings pardon doth not only cleare the offence it selfe, but all the dependencies, penalties, and disabilities incident unto it, and that against the appellant. For though the appellant hath an interest in the originall fact, which the King would not discharge as against him, yet in the breaking of the prison he had none but oblique. And it was said that he could no more call him theefe, in the present tence, then to say a man bath the por or is a villain after he be cured or manumitted, but that he had been a thiefe or villain he might say. And it was held no great difference, though this had been a speciall pardon and not knowne to the defendant, for hee must take heed at his perill that he doe no man wrong. And there is no necessity nor use of such derogatory wordes to be allowed to ignorants. But it may well be, that if a man had committed felony, and got a secret pardon, yet another man not knowing of the pardon may justifie the apprehending of him for the felony, because it is Advancement of Justice; even as a common voice and fame is a sufficient warrant to arrest for felony, though the same be not true: But so it is not to call him thiefe, for that is neither necessary nor advanceth nor tends to Justice, *vide Residuum supra*, see for the force of a pardon in Parliament c. lib. 6. 13. 14. and my discourse upon it there.

Common fame  
a sufficient  
warrant to ar-  
rest for felony,

London.  
Hill, 10 Jac.  
Rot. 1793.  
An action of  
debt brought  
upon a lease.

*Nomine pæne*  
is not forfeited  
without de-  
mand.  
An 100<sup>l</sup>. de-  
manded part  
for rent, part  
for pain,  
judgement  
is divided.  
Extent changes  
not possession  
till liberate.

\*Want of vifne  
hurts not  
where the ad-  
versarie con-  
fesseth the  
matter.  
See infra fol.  
Riches case: ob-  
serve the rea-  
son of the  
difference,

### Sir Richard Grobham Knight, against Thornborough.

Sir Richard Grobham brought an action of debt of 100 pounds against Thornborough and others, and declared upon a lease made at London of the Mannor of Leckford-Richards, in the County of Southampton, and of a capital messuage in the same County of Southampton, and four closes pasture to the same messuage adjoining, lying in Leckford in the same County of Southampton, &c. rendring 120 pounds a yeare, with a *nomine pæne* of 8 shillings a day, for non payment, and then shewes that 60 pound was behind for halfe the yeare, at such a feast, and so remained behind by the space of a hundred dayes, making forty pound, so together the 100 pound. The defendant confessed the demise, and pleaded an extent of the land by a stranger, upon a Statute acknowledged before the demise; but shewes that the Liberate was executed after the rent due, whereupon the plaintiffe demurred, and judgement was given for him for the 60 pound rent, because it was due before the Liberate executed.

And though the lease were ill laid in the declaration, in as much as the capital messuage is laid in no Towne, but in the County at large; neither can be holpen, by the Towne set for the four closes, for the sentence is perfected for the house and finished before, yet that fault being but want of a vifne, is cured because the defendant hath confessed the lease.

\* But for the 40 pound paines, it was adjudged against the plaintiffe, because he laid no actual demand of his rent at the day, without which a paine is not forfeited. Though a demurrer confesse the fact well pleaded, yet if the defendant here had demurred, he might have taken advantage of the ill laying, but here the defendant did both admit the lease by pleading the extent to defeat it, and yet more did confesse it directly by a *bene & verum*, &c. And a lease so made is good.

Thomas



Thomas Virely againſt Roger Gunſtone.

Norfolk H.  
13 Jac. and  
T. 13. Jac.  
Ror. 252.  
Cher. Cham.  
Perjur'd fellow

Thomas Virely brought an action of the caſe againſt Roger Gunſtone Clerke in the Kings Bench. for calling him perjured fellow, and had judgement *quod libet dicat*: And thereupon had a writ of enquiry of damages to the Sheriffe of Norfolk, thus: *Præceptum eſt vic. quod per ſacramentum duodecim proborum legalium hominum de Balliva ſua diligenter inquirat qua damna, &c. Ubi* where, upon the Sheriffe returned, *Quod mandavit Iohanni Geſtingham Balivo libertatis Hæ. Hæc mil. Hundredi de Blackcloſe cui execut. præd. brev. totaliter reſtat* Inquiry of damages by enquiry of office by a Bayly of Liberty. *Ubi, & quod alibi infra Com. præd. per ſe fieri not potuit. Qui quidem Ballivus ſe reſpondit.* And ſo ſets downe an Inquiſition beſore the Balliffe, and 40 damages. Hereupon a writ of error was brought in the Erchequer Cham- ber, and agreed by all the Judges, that the returne was inſufficient, for it was apparently untrue and againſt law, becauſe the warrant was directed to the Sheriffe himſelfe to be executed in any part of his Shire, and no venue contain- ed in this Inqueſt of office, as there is in other writs which intitles the Balliffes of liberties. But yet the Court would not reverse the judgement, becauſe there were diſſerſe of the like, both in the Kings bench and Common Pleas, eſpecially in Suffolke and Norfolk in latter times.

Inquiry of  
damages by  
enqueſt of  
office by a  
Bayly of  
Liberty.

Returne of a  
Sheriffe falſe  
in law.

Slawneys Caſe.

Co. Ba.

In the Prerogative Court Sir John Bennet the Judge according to the Cuſtome, had taken bonds of one Slawney, upon granting of an adminiſtra- tion upon the conditions uſuall there; whereof one is, that the adminiſtrator ſhall diſpoſe the ſurpluſage of the goods after the debts and legacies paid, ac- cording to the direction of the Court. Whereupon, the teſtate having left a will, to whom the adminiſtration was committed, the Judge did now finde a ſurpluſage in her hands, and did ſentence that ſhe ſhould give certaine portions certaine of the kindred of her husband, being not his children, whereupon a Prohibition was prayed in her behalfe. And the Court was of cleare opinion, that whereas the ſtat. of 21 H. 8. appoints the adminiſtration to be granted, and that the Ordinary ſhall take ſureties for the true adminiſtration of the goods of the dead, That the Ordinary ſhall not impoſe any other or further condition upon the bond, and though the Ordinary will pretend that the true adminiſtration mentioned in the Statute is to be extended as well to the diſpoſition of the ſurpluſage, as to debts and legacies, yet that is not under their judgement, for they muſt take their bond according to the law; and when it is ſo the meaning and expoſition of the Statute, and of the condition of the Obligation, both are to be judged by the Courts of Common Law. And I ſaid that if a man obſerve well the ſtatute of 21 H. 8. cap. 5. he ſhall perceibe by preferring the wiſe and children to the adminiſtration that the Statute did intente the minds of the teſtate to preferre them that it is like he would have preferred if he had made a will, which muſt be by giving the profit of the eſtate, and not onely labour and dolour in ſuing, and being ſued, to bring in and defend the eſtate, and then to give this vaſt power to the Ordinary to give the ſurpluſage where he will. To which opinion and reaſon the reſt of the Judges did incline. But yet the cauſe with the conſent of Sir John Bennet himſelfe, was re- turned to the order of Serjeant Harris and Hutton, who were of Counſell for the Prohibition.

The power of  
the Ordinary  
upon the ſur-  
pluſage of the  
goods of the  
teſtate.

## Spendlow against Sr William Smith.

Dilapidations.

Court Ecclesi-  
astical cannot  
examine a de-  
linquent upon  
oath.Court Ecclesi-  
astical cannot  
interpret a stat-  
ute.

Spendlow Parson of Skiron in Norfolk, sues Sir William Smith of Essex, Serenator of one Smith the last Parson there for dilapidations, in the Archdeacon. And among other things, there was a question about a lease for years, which was alleged to be taken by Sir William Smith in his own name, but obviously in trust, and for the use of the said Smith the Parson, whereupon they would put Sir William Smith to his oath, to answer concerning the Covenants; whereupon the Court granted a prohibition quoad examining of him upon his oath concerning the Covenants, for though the original cause belong to their cognizance, yet the Covenants and fraud is criminal, and the avowing of it to be done in fine is punishable, both in the Starre Chamber, and by the penall law of fraudulent gifts, and therefore not to be extorted out of himselfe by his oath. Also the position of the Statute 13 Eliz. cap. 10. of Dilapidations, and what shall be Covenants or not within the law, rests not in them to judge, but in the Courts of Common law.

Edward Skeat against Oxenbridge and  
Ethered his Wife.

Wast.

Surrey  
Tr. 12 Jac.  
Regis. Rot.  
489.

Edward Skeat brought an action of wast, against Oxenbridge and Etheldred his Wife, and the writ was *De omnibus terris & Gardiniis in L. de quibus Edwardus Skeat gen. jam defunctus fuit seiscitus in dominico suo ut de feodo & se inde seiscitus existens post quartum diem Febr. An. 27 H. 8. inde secessit Edmundus Sliseild & al. ad usum pred. Edwardi Skeat defuncti & pred. Etheldred pro termino vicariorum eorum, & eorum alterius diuini vicentis, & post decessum pred. Edwardi Skeat defuncti, & Etheldred tunc ad usum heredum de corpore predicti Edwardi Skeat defuncti preceperunt super corpore pred. Etheldred. After a writ upon issue was found for the plaintiffe, exception was taken to the writ, because he did not say the forement to be made to the seccors and their heirs, insomuch which there could be no inheritance in *Cessary que use*, and by consequence and consequence no disinheriton, as the Action of wast imports, which was agreed to be true. Yet it was judged for the plaintiffe, because the Clerk of the Chancery affirmed and showed their books that they granted the writ attornes in that case since the making of the statute. And the declaration proceeded further in that case, and into the seisin in fee as it must.*

Wries of wast  
wanting substance  
allowed by reason of  
practise.  
Briefe generall  
and Count  
speciall.

So note a new writ in forme allowed wanting substance, by the practice since it came in use, though it be late, for the plaintiffe in this case might have had his writ generall and then there had been no question of it, for the generall writ should have been maintained with a speciall declaration, as it is counted in many cases. And the like president with the principall, was found by Brownlow 7 E. 6. Ter. Pasch. rot. 918. inter Gannum Carew milite et Thome Carew et Elizabetham 3a fem in wast.

Vide for the like upon a writ of *Qui in vita* 39 H. 6. 38 Fitz. N. B. 193. M. 8 E. 3. 191.

Talle by what  
words.

In this case it was holden cleare, that Etheldred the wife had but an estate for life, and that the intaille and inheritance by the forme of limitation *super*, rested only in the husband Edward Skeat. It is all one, as if it had been *hereditas Edwardi Skeat de corpore suo super corpore, &c.*

Earle of Cumberland, against the Countesse Dowager.

**E**strepement judiciall was awarded out of the Court to the Coroners of the County of Westmerland in the action of wast, brought by the Earle of Cumberland against the Countesse Dowager, because the Earle was Sheriffe of the same shire, by which writ the Coroners were commanded to suffer no wast to be done in the lands, &c.

Now this forme writ was made in Court, that the Ladies people had done wast after the writ published and made knowne unto them, yet the Court would not commit them, because it was not a writ directed immediately to the Lady and her servants, commanding them to doe no wast as it might have been, and that it had been immediate contempt to the Court. But here the Coroner himselfe to provide against the wast by taking *posse comitatus*, if there be no remedy of the like.

Day versus Savadge. Trespasse.

**M**atthew Day brought an action of trespass against John Savadge for taking away a bag of Nutmegs. The defendant pleaded that the City of London was an ancient City, and so had been time out of minde, and that the Mayor, Citizens, and Commonalty had been by all that time a corporate body, and seized of a wharf or wharfe in London called Queene-Hiche, and by all that time had used to have and take for goods laid upon the same wharfe, to be conveyed from land by water of persons not lawfully thereof discharged, wharfage, that is to wit, a half penny for every Porters burthen there laid to be so conveyed, and in default of payment, to distraine such goods upon the said wharfe, by a person, who was to be appointed, for the collection, and then shewes that two persons unknowne brought two Porters burthens of the goods of the last plaintiffe, and so person lawfully discharged, whereof the bag of Nutmegs in question was one part, and laid them upon the said wharfe to be conveyed by water. And the defendant being appointed Collector, &c. demands two halfe pence, and saith they were not paid, distrained &c. as was lawfull for him to do. The plaintiffe by way of replication, confessed all the barre in generall, and said that within the said City there was, and time out of minde had been a custome, that the freemen of the said City, had been, and ought to be discharged of the said payment of wharfage for their goods, and averred, that he was a freeman of the said City &c. The said defendant said, that there was no such custome within the said City, *Et hoc paratus est verificare ubi & quando, & prout Curia consideraverit*; and then addes a sennelle thus: *super quo pred. Joh. Savadge dicit quod in custome pred. there is, and time out of minde hath been a custome, that when any ware &c. upon any custome of the said City is joyned, though the Mayor, Commonalty, and Citizens be parties to the action, the Mayor and Aldermen of the City have used to certifie to the Justices the truth of such custome; and that the said custome and all other customes of the said City by authority of Parliament in the seventh yeare of Richard the second was confirmed. And prayed the Kings writ to the Mayor and Aldermen of the said City, to certifie &c. And the last plaintiffe saith, that the said issue ought to be tried by Jury, and not by Certificate, and that such custome alleged by the defendant, for the trial by Certificate *ut supra*, is against the law and common reason, and prayeth judgement, and that the cause may be tried by Jury, whereupon the defendant demurreth.*

After some arguments at the barre *pro & contra*, wherein nothing was questioned, but whether the custome in this speciall case were good, that the Mayor and Aldermen should certifie a custome which concerned the interest of the Corporation whereof they were a part.

The Court now being agreed determined to give judgement, and intreated me to pronounce it for them all, and so we gave judgement, that this custome was not

Brownlew T.  
12 Jac. Rot.  
619. Custome  
of London to  
certifie their  
custome upon  
the mouth of  
the Recorder.



not to be tried by Certificate, but by the Jury, whereof I gave three reasons.

The first, that it was not properly a custome, but a kind of prescription, or in the nature of a prescription, and then clearly it was not within their custome.

Secondly, that it was no such custome as was within the reason or meaning of that special peculiar forme of trial by Certificate, that was granted and used in London.

Thirdly, it was against right and Justice, and against naturall equity to allow them their Certificate, wherein they are to try, and judge their owne Cause.

Custome  
against law to  
try and judge  
their owne  
cause.  
Custome and  
Prescription  
their nature  
and difference.

As to the first it is apparent, that as Savage pleads it for the Citie, it is a meere prescription in the Corrozon, and if he had joyned unto it (as he ought to have done) the point of discharge of Citizens expressly, as he did generally, under the name of persons discharged, it had been a meere intire prescription throughout, and so pleaded.

Now though he omitted that part, yet when it comes to be shewed on the other side, if it be true, it appears to be a branch of the said prescription, and of the same nature, and no custome.

And yet it is true, that being pleaded apart by it selfe by the inhabitants, as to a discharge of Freemen, it must be pleaded by way of custome, and not by way of prescription, not because of the nature of the thing, but because the Freemen cannot prescribe in their persons, and therefore are allowed to lay a custome for their discharge, so that naturally a prescription or a thing prescriptible is so to be laid, where by law it may be, and not by way of custome, and where it cannot be by law, and therefore is pleaded by way of custome, the nature of the thing is not changed, but remaines still a prescription in his kind, though it be allowed to be pleaded, by way of custome for necessities sake. And this learning appears well in Gatewards case, Co. lib. 6. 59. b. where it appears, that a thing lying properly in prescription, as common old in that case being, an interest, which must inhere in some body, cannot be pleaded by way of custome nor cannot stand by custome where it cannot stand by prescription, as there they would have made it for inhabitants, that are not permanent to prescribe; but yet common for copyholders in the Lords soyle, is allowed to be pleaded by custome for necessities sake, whereas in the soyle of another, it must be laid by prescription in the Lord, and yet the nature of both is a prescription.

But a matter of discharge as the principall case is, and discharge of tithes, as Gatewards case shews, may be laid by way of custome, for that is not an interest, but an exemption, not *Positive*, but *Privative* of the generall possession. So it is indeed but an exception out of the interest and in truth, should be so pleaded as in the principall.

As to the second point. This priviledge of London is to be understood of such customes, as are of the nature of locall lawes, peculiar lawes for that Citie, generall to all the Citizens differing from the generall law of the kingdom, such as Littleton calls in his chapter of Burgage the customes and usages in many Boroughs; and samples them that the younger Sonne shall inherit, that the Wife shall have the whole land in Dower, and that their houses and lands are devisable, such are the customes in London, of sovraine attachment. 7 E. 6. Dier 85. & 3. Eliz. Dier 196. and the custome 5 E. 4. fo. 30. that if a Debtor become fugitive, he may be arrested before the day of payment. And Co. 5. lib. fo. 83. Snellings case, that if one Citizen be indebted to another in a single contract, it shall be equal to an Obligation. And 21 E. 4. 16. 74. 75. And 21 E. 3. 46. a good case to this very purpose, where in an Assize of fresh soyle, in the Court of Oxford, it was pleaded that the custome of the Towne was, that if a man had possession of lands by 40. weekes, he could not be put out but by the Kings writ, whereupon the other would have taken issue no such custome. But it was resolved that this being the law of the Citie, was not to be tried by Jury, but by the Judges, as a matter of law, and so indeed in nature of a Demurrer.

And the reason thereof is, that the Judges of every place are supposed to have knowledge

Customes in  
London.

knowledge of the lawes of the place whereby they doe Judge, and to have  
 customaries among them. And therefore in ſuits in their owne Courts doe deter-  
 mine them, as the Judges at the Common Law doe in the Kings Courts,  
 judge the generall customes of the whole kingdome, being the Common law.  
 And ſo in London by ſpeciall priviledge, they certifie alſo their customes of this  
 nature into the Kings Bench, which other Townes doe not. But their cu-  
 stomes, even thoſe that are their locall lawes, are tryable by Jury, if they come  
 in ſue in the Kings Courts. And agreeing with this was found, and ſhewed  
 a precedent Mich. 37.38. Eliz. Rotulo 418. in the Common Pleas London,  
 between Bilford plaintiffe, and Lowe defendant in an action upon the caſe for  
 certaine parcellles of Plate. And the iſſue was, whether the cuſtome of London  
 was, that there was a Common market in London, for all goods in all open  
 ſhops, all dayes, except Sundayes and holy dayes, from the Sun riſing to the  
 Sun ſet; and concluded, *Et hoc parati ſunt verificare, ubi & quando ac prout Curia  
 conſideraverit.* And then the defendants made their ſurmiſe for the tryall of their  
 cuſtome by the mouth of their Recorder, and prayed a wiſt accordingly; And  
 it was granted returnable in Trinity Terme; and continued *per non miſis bre.*  
 21. 22. Mich. And then it is entred, that the Conclusion of the defendants  
 plea, ought to have been *Et de hoc ponit ſe ſuper patriam*, whereupon the Plea  
 was ſo made and iſſue taken, and upon *venire fac.* to the Sheriffe of London  
 ſent for the plaintiffe, and had judgement: which is a ſtronger caſe, then this  
 at the barre.

Custom of  
 London to  
 certifie their  
 Cuſtome by  
 their Recor-  
 der.

And further in the principall Caſe it cannot properly be ſaid to be a cuſtome  
 of the whole City, nor for all the Citizens perſonally, as all the customes in  
 the nature of lawes are, and as the ſoyne of ſurmiſe for the tryall doth import,  
 as it concernes onely the body Corporate of the City, and the place Queen-  
 ſick only where the profit ariſeth, and where the diſtreſſe is to be taken for it.

As to the third point, the bookes are full, that challenges are allowed, where  
 the ſuit concernes a City, or Corporation, and they are ſo make the party  
 where any of their body be to goe on the Jury, or any of kin unto them, though  
 the body Corporate be not directly party to this ſuit, for which purpoſe ſee. 15.  
 E. 4. 18. 28. aff. 18. 21 E. 4. 11. where a Deane and Chapter bringing an  
 ſſue a Jury was challenged, becauſe he was brother to one of the Preben-  
 daries.

Now if ſuch challenges be allowed, where an alſeint lyes for a falſe verdid,  
 and moze here where there is no wayes to reverſe a falſe Certificate, and yet  
 ſo true that the Certificate is no judiciall Act, but miniſteriall. And therefore  
 if the Certificate be falſe, the party ſhall have his remedie by action of the caſe,  
 not that not againſt the Recorder, but againſt the Mayor and Aldermen, for it  
 is their Certificate by their Recorder, and ſo to the pleading and ſurmiſe, and  
 to wiſt to Certifie is a warrant to them, which takes away one defence made  
 againſt their partiality to themſelves, that they did not certifie, but their Re-  
 corder. As where a grant is of a cogniſſance of Pleas to be holden beſore the  
 Steward of the Grantee, *licet the Grantee fuerit pars*, but there the Steward  
 is Judge himſelfe, and not the Grantee, as the Kings Judges are between  
 him and the parties, but here the Recorder is but their mouth to ſpeake for  
 him, as they command him.

By that that hath been ſaid it appears, that though in pleading it were  
 ſuſtained, that the cuſtome of Certificate of the customes of London is confirmed  
 by Parliament, yet it made no change in this caſe, both becauſe it is none of the  
 customes intended, and becauſe even an Act of Parliament, made againſt na-  
 turall equitie, as to make a man Judge in his owne caſe, is void in it ſelfe, for  
*his natura ſunt immutabiles*, and they are *leges legum*.

Stat. cap.  
 eſtabliſh Cu-  
 ſtome againſt  
 naturall equi-  
 tie

*Lastlow* against *Thomlinson.*    Assumpsit.  
Hill. 11 Jac. Rot. 1484.

Checq. Ch.

London  
Assumpsit.

The law regardeth  
not things too  
small.

**L**astlow brought an *Assumpsit* against *Thomlinson*, declaring that *Thomlinson* sold him so many *Dates*, as according to the rate of 10 *Shillings* 9 pence for every *Quarter* shall amount to 52. pound, to be delivered such a time, which money the plaintiffe promised to pay such a time. And that the said *Dates*, after such a rate, came to 96. quarters and 6. *Bushells*, which the defendant, hath not delivered, to his damage &c. Upon issue *Non Assumpsit*, it was found for the plaintiffe. And upon judgement a writ of *Error* and *Error* assigned that 96. quarters, and 6. bushells of *Dates*, after the rate aforesaid, came to 52. pound, and three *Farthings*, and so no breach, because he was not bound to deliver so many. But the judgement was affirmed, both because it was not certaine, whether it amounted to any more, the account was so busie: And also because it was not possible in effect, to mince the measure so, so as it shall hit the just summe, as the odd hounes are not accounted in the peare.

*Herrenden* against *Margaret Palmer.*  
Hill. 12 Jac. Rot 921.

London  
Assumpsit.  
upon promise.  
Checq. Ch.

**H**errenden brought an *Assumpsit* against *Margaret Palmer*, administratrix of her husband, and declared that her husband had bought of him, gold and Silver, and Pearle, and was indebted unto him for them two hundred pound, and the after his Death, had likewise bought of him Pearle, for 27. pound, and that upon Account, she was found indebted both those summes unto him, and promised payment: judgement for the plaintiffe, and assigned for *Error*, that the defendant was to be charged by two severall actions because she was charged in two manners, one in her owne right and the other as administratrix, and therefore the judgement was reversed.

*Nichols* and *Raynbred.*  
Hill. 12 Jac. Rot 131.

Assumpsit.  
Subj.

Promise for  
promise.

**N**ichols brought an *Assumpsit* against *Raynbred*, declaring that in consideration, that *Nichols* promised to deliver the defendant to his owne use a Cowe, the defendant promised to deliver him 50. *Shillings*: Adjudged for the plaintiffe in both Courts that the plaintiffe need not to averre the delivery of the Cowe, because it is promise for promise. Note here the promises must be at one instant, for else they will be both *nuda pacta*.

*Brinsley* and *Partridge.*  
Tria. 9 Jac. Rot. 318.

Checq. cham.  
Assumpsit  
Derby.  
Declaration  
casting upon a  
total.

**B**rinley brought an action upon *Assumpsit* against *Partridge*, declaring that he accounted for divers summes of money, due to the plaintiffe by the said defendant, and upon the same account, the defendant was found in arrearses to the plaintiffe 7. pound, and that the defendant in consideration thereof, did promise to pay to the plaintiffe the said 7. pound, at a certaine day then to come, which he did not pay, to his damage, &c. The defendant pleaded *Non Assumpsit*, whereupon the plaintiffe had judgement: The defendant assigned for *Error*, that the consideration was not sufficient, because the plaintiffe did not shew, whether the money upon the said account was due, as for moneyes received or lent or for wares bought and sold; notwithstanding judgement was affirmed, because by the accounts, the debt was confessed good, and the promise made thereupon good.

Rich.



## Rich against Shere.

Hill. 5 Jac. C.B. Rot. 1284.

## Ejectione.

Cornub:

**R**ich brought an *Ejectione Firme* against Shere, and declared that whereas Richard Harris and other, 9: Octob. 5. Jac. Regis at Saint Gynneys, in the County aforesaid, did demise, grant and to farme let to the defendant one messuages, 4. Gardens, 200. Acres of land 20. Acres of Meadow, 80. Acres of pasture, 6. Acres of Wood, and 60. Acres of Heath and Furze, with the Appurtenants, called east Ditzard *alias* Dizard in the said County, To have and to hold, to the said defendant, for five yeares, &c. The defendant pleads not guilty, whereupon the plaintiffe had judgement. The defendant assigned for Error, that the plaintiffe in his declaration, did not shew in what Towne, Parish, Hamlet, or place the said Tenement, called the east Ditzard *alias* Dizard lay, but in the generall County aforesaid. For that cause the judgement was reversed in the Exchequer chamber this Hillary Terme 13. Jac.

Note, here is a trepell without a *Vifne*, if the Jurys were from Saint Gynneys, and if it were *de Corpore Com.* it was not good, for that is not to be allowed, where a nearer place may be, but for titles, as knight or not, or the like, which are at large.

Landlaid in a  
County with-  
out a Towne.

*Vifne.*

Want of it in  
the declaration  
hurts where  
the matter is  
confessed by  
the defendant.

## Foxcroft versus Lacy.

Trin. 11 Jac. Rot. 1099.

Ebor:  
Case.

**F**oxcroft brought an action of the case against Lacy and declared, that where- as Lacy, and soure others had a suit in the Star Chamber against the plaintiffe and sixteen others concerning Conspiracies, &c. and that communication was made between John Walter and Rice Guyn Esquires, concerning the said suit, that the defendant Lacy upon the said communication in their presence, spake these words: These defendants, *Innuendo* the plaintiffe and the other sixteen defendants are those, that helped to murder Henry Farrer, meaning one Henry deceased, who was murdered by one Thomas Oldfeild, who was hanged for it, to the plaintiffes damage &c. The defendant denieth the words, and stand for the plaintiffe, and judgement given, Error was assigned generally, that the judgement should have been contrary, but judgement was affirmed, for it was holden, that it was sufficiently laid, to entitle every one of the defendants to a severall action, as if they had been specially named.

Action for  
slander to ma-  
ny not named  
but signified.  
Chocq. Ch.

## Bayle versus Gird.

Trin. 12 Jac. Rot. 1599.

## Assumpsit.

Chocq. chapl.

**B**ayle brought on *Assumpsit* against Gird, declaring that in consideration he should dye divers Clothes, called Devonshire Berries, into severall colours, naming so many severally as amounted in the whole to be 60. That the defendant did promise to pay him a certaine summe, for the dying of every severall Cloth, and averres, that he did accordingly dye the said Clothes amounting in all to 59. Whereas indeed they were 60. *ut supra*. And that the money came to 19. pound, which he hath not paid. Found and adjudged for the plaintiffe, and Error Assigned, in that it appears he should have dyed 60. and dyed but 59. And so the sum aforesaid not due. Also the Jury did assesse damages *occasione detentionis debiti pred.* Whereas it should have been *occasione non performance Assumptionis &c.* But the judgement was affirmed, for that it was first averred he dyed all, which appeared before to be 60. So the other was but a misnaming, and as to the other, it was a debt, and a promise implied upon it.

Devon.  
Mishnaming  
hurts not.

A *Assumpsit* for  
dying Clothes.

Cherq. Chamb.  
London.

Keere versus Owen.

Error.

Mich. 5 Jac. Rot. 79.

Error.  
Elegit.  
Error in execu-  
tion.

**K**ere recovered 400 pound debt, against Edward Owen who dyed, and upon a Scire fac' into the County of Surrey the Sheriffs returned *Rebecca terre-  
nant omnium terrar' & tenementorum in balliva sua qua fuerunt prad' Edwardi, &c.*  
And judgement given, that Keere should have judgement and execution against  
the said Rebecca; whereupon the said Keere prayed, the *Elegit* thus entered in the  
Roll, *Elegit sibi liberari medietatem omnium terrarum, & tenementorum in Com'  
Surrey tenend', &c. quousque*; and left out, *Qua fuerunt pradicti Edwardi, &c.*  
And for this judgement was reversed quoad adjudicationem executionis, upon the  
*Elegit*, and yet the writ of *Elegit* it self, and the return of it, were well in that  
point. But where the Roll is faulty the Writ will not help.

It was also assigned for Error, that the was returned *Terre-tenant omnium  
terrarum*, without assigning of what in certain, that was not allowed for  
Error.

Mandamus.

Spathursts Case. H. 13 Jac.

The Cher, Ch.  
Error,  
Vt de uno grosso  
Elegit.

**A**fter the death of John Spathurst, by Mandamus in Suffex, it was found that  
he died seised of certain lames, *Et quod teneatur de dominico Rege ut de uno  
grosso per vigesimam partem unius feodi mil.* This was ruled by the chief Baron  
and my self, my Lord chief Justice being absent, that it was a tenure by knights  
service in chief. All tenures in chief are in gross, and the words *ut de uno grosso* are  
scarcely of any sense, but of no certain sense at all in Law, and so stand as void.

Commission.

Sir Thomas Puckerings Case. H. 13 Jac.

**I**t was found by Office, taken at Barnet in the County of Hertford, 18 Mai.  
38 Eliz. by Commission, in the nature of a *Diem Clausit Extremum*, that  
Sir John Puckering Knight, late Lord Keeper of the great Seal of England and  
the Lady Jane his wife, were jointly seised to them, and the heirs of him of the  
Manor of Weston, in the County of Hertford, and of the Manor of Kingerby,  
in the County of Lincoln, by the original purchase of the said Lord Keeper,  
and that they being so seised thereof, and that the said Sir John Puckering being also  
seised in fee of the Manor of Weston Argentine, in the County of Hertford, and of  
the Manor of Kington, in the County of Warwick, he ultimo April. 38 Eliz. died so  
seised, and that the Lady Puckering him survived, and that the Manor of Weston  
onely, was held of the late Queen in Capite by Knights service. And that the  
rest of the said Manors were held in socage, and not of the Queen in Capite by  
Knights service, and that Sir Thomas Puckering was his son and heir, of the  
age of four years 3 Decemb. before the death of his said Father.

The said Lady Puckering 17 Mai 9 Jac. dyed, Thomas the heir 3 Junii 10 Jac.  
was made Knight. 3 Decemb. 10 Jac. he accomplished his true full age, and ren-  
dered his livery, and within the time limited, he sued forth a speciall livery, un-  
der the great Seal of England, no Office being then or yet found of the death of  
the said Lady, nor any charge they imposed upon the heir of his said lands.

In the said speciall livery, there is contained a Release, and pardon from his  
Majesty to the heir of all entries and intrusions, made by the heir into any of the  
Manors and lands, wherof his Father died seised, and also a pardon, and Release  
of accompts, and of all Actions, suits, quarrels, impeachments, executions, and  
demands whatsoever, which his Majesty, at the time of the suing forth of the  
said livery by any means had or might have against the heir, not extending to dis-  
charge him, or his lands of any debt, accompt or demand, by reason of any Office  
or Receipt of any of his Majesties monies or Treasure, or of the conversion of the

Ward made  
Knight.Livery speciall  
what it dischar-  
geth.

the same, or of any debt then due, by Recognizance or Obligation. The auditors, since the speciall libery aforesaid sued, have imposed severall charges upon the heir, one for mean rates due, as is supposed between the death of the said Lady, and the true full age of the heir; And the second charge not of a summe in particular, but to bring the heir *ad Computandum pro meliore valore*, and upon a Demurrer to this last Charge, for the incertainty and insufficiency thereof, and with a plea to the former Charge this case appeareth, wherein these Questions arise:

Whether the last Charge be lawfully imposed upon the heir or no, in regard to the Charge is generall, *ad computandum pro maiore valore*. And it is not grounded upon the said Office, nor warranted by any President, or by the course of the Court.

Whether the King be, or can be entituled to any mean rates, between the death of the said Lady Puckering, and the Knight-hood of the said Sir Thomas Puckering, or between his Knight-hood, and between his true full age, no office being found of the death of the said Lady Puckering, nor any charge imposed, between the said Knight-hood, or the said speciall libery sued.

Whereupon we resolved, that the Auditor can set no charge, nor award process to answer any Charge but upon a Record, as an Office or the like.

But yet if an Office be found onely in one Shire of all the lands, lying as well in other Shires as there, which in law is no office, but for the proper Shire, yet this by the course of the Court is allowed as an Office to all to ground a charge and proccesse upon; and this is beneficiall to the Subject, who else by divers Offices would be put to an intolerable charge.

Again, where in this case there was an Office, after the death of Sir John Puckering, of the Manor of Weston, in the proper County of Hereford, whereby the estate thereof was found: Out of which it did appear, that no wardship of the land could accrete during the life of the Lady, because it was but a Remainder to the heir, so that an Office ought to be found of her death: yet because the small cause of the wardship is the Remainder descended, and the death of the Lady is but a removal of the impediment of the wardship: it is therefore allowed in the course of the Court, and in ease of the Subject, that the certificate of the probary of the death of the Lady, made into the Court without office, shall be sufficient to put it in charge.

So here it was resolved, that if the Feodaries Certificate of the death of the Lady were in Court, before the speciall libery granted, that the mean rates incurred from the death of the said Lady, till the Knighting of Sir Thomas Puckering, were not discharged by the course of the Court, because they were by that writ of the Court adjudged in the King, vested upon Certificate as well as if it had been upon Office; but those that were incurred since his Knight-hood (being then made of full age in Law) till his full age indeed were perfectly discharged by the speciall libery, or rather indeed by the Knighting of him, and tender of his libery, which he might tender as soon as he is knighted, being then made to all cases of wardship of his full age, for the wardship of the body continues not, as if he were still under age, but the value of his marriage he must answer, because it was fully vested in the King by his nonage before.

1.  
Course of the court of Wards.

2.  
Office findeth descent of Rem. there needs no new office upon the death of the Tenant for life.

Pasch. 14 Jac.

Star-chamber.

The Lord William Howard, against Christo. Bell, Tho. Salkeld, John Dacre, and others.

In the Star-chamber, in a cause between the Lord William Howard plaintiffe, and Christopher Bell, Thomas Salkeld, John Dacre, and other defendants. It was holden by my Lord Coke, and my self, that the Tenants of the Manor of Giffeland claiming tenant right, and being now impeached by the plaintiffe, being Lord of the Manor, who suppose their estates to be void in law, that they might all



all join together in a quiet and peaceable manner, to defend the cause, being common to them all; and therefore though some particular persons were sued, yet they might defend the suit upon their common Charge. And the reason was, that since the title was one against all, it was in effect but one defence, and one defendant, for the trial in one mans case tried all. And therefore the Courts of Justice doe every day deny them to be witnesses one for another in such general cases, as in cases of common *Modus Decimandi*, and the like, wherein also it is many times ordered for avoiding of unnecessary multiplicity of suits, that a trial be had in one mans case for all. Now as they are acknowledged parties to their prejudice in defence, so it is in reason that they be in like manner allowed for their advantage. And so it was said, that it had been ruled in that Court before in the case of the *L. Grey of Groby*. Yet the *L. Chancellor* seemed to be of a contrary minde, and cited a president in 8 El. to that purpose. But yet in this case it was agreed, that they must not join themselves together by Oath, which was in this case suspected, but not sufficiently proved. But Bell being a tenant was fined a 100 pounds for assembling the tenants to the number of 200 in an open field, where Leonard Dacres had been in open rebellion, and fought a battell with the *L. Forces*, divers of the said tenants being weaponed with swords and daggers, abiding three hours together, and yet nothing was proved done there by any of the defendants, but conference concerning the defence of their title by promises and twisting, and contribution of money to that purpose. And Hodson another tenant was also punished for being present at that assembly, and the event of such assembly is in no mans power to moderate. And Salkeld and Dacre were fined a 100 l. a man, because that being no tenants, nor any ways interested in the cause or title, and being men of strength and countenance, they did thus themselves by way of maintenance into it, warranting the title, stirring the people to persist in it to give occasion of suits at the last, where perhaps else the cause had been ended by way of agreement, with all, as it hath done with many. But Salkeld and Dacre were not of the assembly, neither did it certainly appear that they were acquainted with all. And Mich. 14 Jac. Barkshire in a case between Edmund Dunch Esquire plaintiffe, and Bannister and others defendants, where the question was between the plaintiffs and the defendants, tenants of the *L. Lord Norris of Dorchester* Spanes for a common in effect claimed, which he denied, though the action were between him and one of them onely, upon a particular custom layed for his tenement only for necessity of pleading. It was resolved by the most part, that they might all maintain with their purse. But because Bannister though he were a tenant had threatened some that they should lose their copyholds for not contributing to the *L. Lord Norris*, he was fined at forty pound, and the fine rest quitted, but the *L. Lord Chancellor* differed.

Assemblies unlawfull.

Maintenance of a common cause by common persons.

Checq. Chamb.

Action of debt upon an obligation.

Paroll [proof] how to be taken.

Gold versus Death.

Obligation.

**H**ugh Gold brought an action of debt upon an Obligation, against Henry Death, Executor of John Death, and the condition was, that where Gold had taken Anthony Death as an Apprentice, that if he the said Anthony should waste or consume any of his goods, and that duly proved by the confession of the said Anthony, or otherwise, that then John Death and his Executors within three moneths next after such due proof and notice thereof given unto him or them, should render him recompence and satisfaction. The defendant pleads, that there was no proof made, &c. The plaintiffe replies, there came to the hands of his apprentice in Flemish money to the value of 3000 pounds of his, whereof the apprentice imbezelled and wasted as much as came to 400 pound, and that he confessed it, and by a writing under his hand did acknowledge and confess it. And that he gave notice of it to the said Henry Death, and he did not make him recompence within three moneths, whereupon the defendant demurred: And it was adjudged for the plaintiffe in the Kings Bench. And now upon a writ of Error in the Exchequer Chamber the judgement was agreed to be confirmed; for though the

the word [proof] put generally, shall be understood by Law such a proof as is legal, *scil.* proof by Jury, yet when the party signifies himself to mean and allow another form of proof, that shall prevail against that that is but by construction of Law. And here it is referred to the discretion of the party which shall be understood as a confession voluntary according to the common acceptance, and not a confession in Court of Record. And, though it be not said to whom he made the confession in the replication, yet by the greater opinion it was holden good enough, because it answered the words of the condition. And yet it is not like Halphen's case of agreement or disagreement to an interest which must be made to the party interested.

yet afterwards it was found and moved by Henrice Finch of Counsell with the plaintiffe, that the notice was said to be given to Henry Death, which was the condition. And it did so where appear that John Death the Constable was dead at the time of the notice, which was a necessary part of the condition. And therefore the judgment was reversed.

Moore versus Hussey, & al.

Ravishment.

Tr. 7 Jac. Rot. 759.

Rancis Moore plaintiffe against James Hussey Doctor of Laws, and Katherine his wife, Robert Walkman, and John Woodford, and Gilbert Clifford Defendants, and counts that before Ralph Horniold lord of the late Queen in chief, and in the thirtieth year of the Queen, having John Horniold his son and heir of two years of age, and that the Queen Anno 35 Regni sui did grant the wardship to the plaintiffe.

The defendants do say that they did take away the said ward to his damage of 2000 pounds. The defendants plead not guilty, and are all found guilty. James Hussey, and Gilbert Clifford damages ten pounds and ten shillings. And the Jury further find, that the ward was married, and was at the time of the marriage 16 years old and more, and under 21, and that his marriage was lawful eight hundred pounds.

And the Court (soll.) Passes 14 Jac. this case was argued by all the Judges of the Common Pleas, after divers arguments at the Barre, and the Court doth make two.

First, whether the wife of Doctor Hussey being a woman covert and found guilty, and her husband not guilty, be within the Statute of Westm. 2. cap. 35. or not, whether husband to pay the value and damages to her.

Secondly, whether the words finding and the ward was married (without saying by whom) be sufficient to charge the Defendants or any of them with the value of the marriage.

And as I said the Question in gross is but one, whether the Plaintiffs shall win in the whole story or not? For to leave all women covert at large, who are both most cunning and vigilant, and have most opportunity to make themselves rich by their daughters or friends, and next to put the guardian after ravishment to hunt out how much the ward, or else to sell or his value, to satisfy to him the Law.

Now to the first point, the woman is plainly within the words, but there are two exceptions to exempt her in meaning. First, because she is a woman covert, but the other because the Statute makes abrogation or perpetual imprisonment, in case the Ravisher cannot satisfy for the marriage. But here it is said that the woman is under a necessary disability in Law to satisfy, and therefore in being out of the meaning shall not be punished (for not satisfying) with imprisonment or abrogation.

Now to the first part it is confessed, that a woman covert was at the common Law sayes to an action of trespass for taking away a ward, as she was for any other action of trespass, and so to be imprisoned for the wrongs fine, and her husband answerable with her for the damages.

Back,  
Waller.  
The ravishment of a Ward.  
C. 1.9. fol. 71.  
Ravishment of Ward against a feme covert.

First great point divided into two.

First branch of the first great point.

And

43 E.3. 23.

Action of trespass against the husband and wife, for the wife of another taken away with the goods of the husband.

And he that observes well this statute shall easily perceive, that it hath two aspects, one civil, another criminal. For it provides that the Executor shall answer for the value, *sed non quoad poenam prisona, quia quis pro alieno facto non est puniendus*, which holds also for the husband and wife, that he shall answer the damages, not the punishment of immediate imprisonment, but the mediate imprisonment that is upon a writ of execution, for the damages and value he shall, as in other trespasses; For if they made the executor (which is but in civil representation the same person) answerable, much more the husband, which is one by law of nature.

Now the action at the common Law was in effect and substance the same that is now, onely it hath received some additions, and some more distinct form of proceeding then was before.

The Writ at the Common Law was, *Quare filium & her. (cujus maritagiū ad ipsum pertinebat, and sometime without that clause) vi & armis raperunt abduxerunt & maritaverunt*, without saying within age; and yet judged good, for it is a guard naturall, not legall, 32 E.3. Fitz. gard. 32. & Fitz. N.br. 91. & 143. & Regist. 98. & 99. And the like for the Guardian at Common law by the word of *raptus & abduxit*, as appears, 29 E.3. 17. & 39 aff. 35. By which books and 12 H.4. 16. it is agreed that both the Father and the Guardian shall recover in damage for the value of the marriage.

The offence therefore and the fact is the same in the very word *raptus* in the Stat. that was at the Common Law, and the restitution the same in effect by distinct valuation of the marriage that was before given consistently in the damage.

The matter is so far the same, that if a man recover in the trespass at the Common Law, it shall barre him in a Writ of Rabbishment, & contra, as in the trespass of battery and appeal of *Maibem*, and in common trespass, and the trespass upon the Statute of 5 R. 2. c. 8 H.6. c. 1 malefactoribus in parci.

Again, the writ upon this Statute hath not estranged the writ at Common law, but participates. And therefore 17 E.3. 73. and 22 Rich. 2. Damage 130. it was excepted that no damage ought to be given in a Writ of Rabbishment, because the Statute gives none but onely the body and value of marriage. It is answered and resolved by the Court, that it was usual, and that the damage was by the Common law, and the marriage by the Statute, and reason it was to join them so.

And it was further said, that it was not the like reason between the Formedon in Descender, and Mordancester, because both these are in the nature of trespass.

At the Common law a man ought to recover for the marriage, though he were not married, for the loss and hazard apparent. Also where a man doth arrest his debtor, and where he might have good bail, the Sherife lets him escape being non-solvent, and not to be had again, the Jury are to give damage for the whole debt in effect; for though the debt remain in law, yet it is lost in effect, and the Guardian at the Common law could not have a new trespass without a new taking, and he could not have a conditionall verdict for marriage after bapting, as this Statute hath provided. And therefore now the damages are distinguishable *ut in sectis laboribus dilationibus & expensis*, as the Presidents goe, *ultra valorem*, which was confined to all before at Common law.

The offence of rabbishment then being not sufficiently provided for, and restrained by Common law, as was perceived, Statutes were made for other punishment of this plagiarie offence or injury, being much greater then the wrong in other creatures, in as much as the body of man is more honourable and of greater price, and was in ancient times used by the Lords, as now it is by the Kings Committtees for advancement of their own children by way of marriage, or otherwise.

\* Whereupon by the Statute of Merton, c. 6. it was provided for wards under 14. *contra pacem vi abductis vel detentis seu maritatis, quicunque laicus inde convictus fuerit qui puerum aliquem sic detinuerit, abduxerit vel maritaverit, reddat per-*  
denti

\*Note the same exception may be taken for a woman covert to exempt her out of this Statute, that is taken for the other.



boni valorem Maritagii, & pro delicto corpus ejus capiatur ut imprisonetur donec penitus emendaverit delictum si puer maritetur. Here it is, si puerum maritaverit, which expounds the other Statute. And then W.1. cap. 22. confirms this Statute in generall.

This Statute was not found full enough to give remedy, and therefore the Statute in question was made, which might well be said to be made by men unlearned, for indeed it was the interest and heat of Lords for the generall abuse that begat it, for the act being in his nature a trespassse and act of force, yet is not *vi & armis*. And therefore 7 H.4.9. the Count *vi & armis* was rejected.

But, the nature of trespassse being to end in damage, this recovers the body it self, and yet not by demand, but by commandement to the Sheriffe to take and deliver the body, and then by judgement giving it to the plaintiffe if it be his.

Again, where all trespassses die with the person, here the action is continued to the heir or executor, against the heir, or executor, and though the heir die, in case of Ward as well as Rabbishment.

And therefore 24 E.3. fo. 29. upon a resumption in such a case against the executor he pleaded Pleniement administer, whereupon issue, and yet the Ward judgment is to the plaintiffe, and 9 E. 3. 15. guard of body and land against thos whereof was died during the Proclamations and resumptions against his heirs, and though he were within age, yet judgement passed presently against all, for it was said that this was the first action, but it was doubted whether the heir should answer damage.

11 H.4.55. If the ancestor have his Ward rabbished, and bying his action and he, the heir shall have the resumption, but not the executor. But if the ancestor bought not the action, the executor shall commence it, not the heir, for it is a case out of the Statute. And in this case Hill says that the makers of the Law were unlearned; which the Reporter reproves.

This progresse of Statutes argues the care of redress, and that there was a purpose by increasing the pains and providing certainly for remedy in case of such of either side to exempt any former offenders. And therefore it hath been extended by equity. Therefore it is given to guardian in socage as the books 1 E.3. 20. tempore E. 1. ff. gard. 133. Register 163. by equity of the Statute of *Complacit*. And Fitz. Nat. br. 139. *is recto de custodia* lay for them both at Common law.

And that is yet stronger both 32 E.3. fo. 31. Gard. & Fitz. N. Br. 142. G. That the Committee of an Orphan, by the Mayor and Aldermen of London, declaring upon their custome shall have the writ and the age, and nonage shall be limited to them.

Age of Orphan  
arbitrary.

And 47 E.3. F. Gard. 30. the King shall maintain that action. This new remedy was given in case of Rabbishment *in odium spoliatoris*.

Upon the trespassse upon the Statute of *malefactoribus in Parciis*, it is confessed the wife is punishable so in trespassse upon the Statute of 5 R. 2. and 8 H. 6.

Of these, the reason is not because the form of the actions, and the Judgements and executions are the same, but because the ground and substance of the action is the same, and the aggravation of offence and punishment is an argument that they were meant to exempt any offender, that was known in law before.

Coverture was not at Common Law so far protected as was infancy, and some other disabilities (*scilicet*) *Non sane memorie*, *Ouster le mere*, & imprisonment. *Lechford's case*. Cl. 8. 29. For a woman covert both no lesse judgement then discover.

And in stronger cases, women Covert are involved amongst others, where a new offence is created, that was not before. And therefore where the Statute of 34 E. 1. is, that if in an Assise the Tenant plead soptenancy with a stranger,

who being called in, maintains it, and it be found false, he shall be imprisoned a year, and not be delivered without a great Ransome. In 21 Ass. p. 28. an Assise was brought against the husband, who pleaded soptenancy with his wife by deed, and she being called in, maintained it, which being found false, she was adjudged to prison according to that Law. Yet 36 E.3. Fitz. Ass. 443. And Saunders in Ployden 364. and Hawes 4 H. 7. 11. agree upon the Statute of Westm. 2. cap. 21. That if an infant fall in an Assise of a Record by him pleaded, he shall

not

not be thereupon judged a diſſeiſor upon that law. And where the Statute of Mert. cap. 3. gives a Writ of Rediſſeiſin, againſt one that being convicted of diſſeiſin, doth again diſſeiſe the ſame perſon, that thereupon he ſhall be taken and impriſoned, till he be delivered by the King by ranſome or otherwiſe,

9 H. 4. 5. If a woman commit a diſſeiſin and be convicted, and then commits a Rediſſeiſin, and then marries, ſhe ſhall be charged in Rediſſeiſin and her husband named with her ſo; conſormity, but he muſt not be charged as a principall Ador in the wrong done, no more then ſo; a treſpaſſe done by his wife beſore he married her, yet he ſhall ſatisfie the damages.

Now where it is in the ſecond place objected, that the womans diſability to pay ſo; the marriage, ſhall excuſe her of the impriſonment and exempt her out of the meaning of the law, under that rule, *Lex non cogit impoſſibilia, ſed impotencia excuſat legem.*

I answer: That firſt that point answers but one branch of the Law, which is, *ſi heredem non reſtitueris vel poſt annos nobiles maritaveris, abjures regnum vel habeat perpetuam Priſonam.* But the claule beſore that is, *Si ille qui rapuit poſtmodum reſtitueris puerum non maritatum, vel de maritagio ſatiſfecerit, puniatur tamen de transgreſſione per Priſonam duorum annorum.* And then follows the other Claule; ſo the ſame perſons are underſtood in both caſes.

Now in the firſt Claule, the impriſonment ſtands abſolute, and hath no ſatisfaction required, to which a wife is unable, no more then the Statute of Merton, within which ſhe is conſeſſed to be. And therefore ſhe may be contained in that, and then in the other alſo. And the text beſore cited I allow, but it hath no uſe ſo; this caſe, ſo; it is to be underſtood impotency to excuſe the law, where the impotency is a neceſſary or invincible diſability to perſorm the mandatory part of the law, or to ſobear the prohibitory.

Now this law and the ſcope of it, is abſolutely and directly to ſobid the Ra- biſhment of a Ward, and the reſtitution of the value, is but a prohibition by way of Condition, if the law be broken. But all laws, which be artificiall creatures doe as well as naturall creatures affect their own conſervation; And therefore doe deſire and command that they be not violated, not that their wrong be redeemed, ſo; as it is ſaid that *penitentia* is but *Tabula poſt naufragium*, ſo it may be ſaid of *Redemptio*. Now then who will ſay, that the woman is unable to obey the law, ſhe is unable to redeem more then any begger, and therefore ſhe ought to be the more carefull not to offend the law, which is in her power; and the penning of the law, is as proper as it is poſſible, ſo; it is not *de Maritagio non ſatiſfecerit*, as the common form of penning in ſuch caſes is, but *satiſfacere non poterit*, which is the caſe in queſtion. And therefore where perſons able have a choiſe, when they offend to pay or ſuffer; ſhe knowing ſhe hath no means to pay, did by offending voluntarily (as it were) yeeld her ſelf to abjuration or impriſonment.

It is true, that all laws admit certain caſes of juſt excuſe, when they are offended in letter, and where the offender is under neceſſity, either of compulſion or inconvenience, or elſe where he is in ignorance invincible; or where the offence is by a meer miſfortune, without will or purpoſe. Or where there is a meer impotency to doe that that is required.

By compulſion. As in the caſe of Lucretia with young Tarquine, of whom S. Auſtine ſays, *Duo fuerunt, & unus commiſit Adulterium*, and thereupon he makes the Dilemma: *ſi caſta, quare trucidata; ſin minus, quare laudata?*

Neceſſity of avoiding greater inconvenience, as where one kills a Theef or a Burglar, in defence of his perſon or houſe, 22 aff. the binding and beating of a perſon Unatque, removing of a perſon Leprous.

In ignorance, as in the caſe of Jacob and Leah.

Such is the excuſe of a Deed, read amiſſe to him that cannot reade, or reported to him that is blinde.

Lunacy in him that kills a man.

Of impotency, as in the caſe of Mephiboſeth, accuſed by Ziba his ſervant to David, and by himſelf excuſed by his impotency, a ſoule action, and an unjuſt judge.

judgement of David towards him, *Festinatio, justitia neverca.*

In all which cases, there is a just excuse of the law not performed. By these the distinction from the principall case appears clear, but the principall falls upon the rule, *Qui non habet in ere, lnat in corpore, ne quid peccetur impune.*

Upon the Statute of Westm. 1. cap. 13. whereby it is enacted, That if a man with a woman, he shall be punished with two years imprisonment, and fined at the Kings will. And if he have not wherof to be fined, to be punished by longer imprisonment. Will any man doubt if a Monk, which hath no substance commit a Rape, but that he shall nevertheless suffer imprisonment?

So upon the Stat. of Westm. 1. cap. 20. *de Malefactoribus in parciis*, it is enacted, That if any be attainted at the suit of the party, he shall be fined, if he have wherof; if not, he shall be imprisoned and finde surety no more to offend.

The Stat. 5 Eliz. If any person forge, &c. he shall pay double costs and damages to the party grieved, and suffer the corporall punishments, shall none be punished, except he can doe both. Indeed the husband shall not upon indictment of his wife, for that is merely in a criminall course, and the husband not party to it, as he is to some actions.

5 Eliz. If any person be convicted of perjury he shall forfeit 40 pound, and if he have not goods and chattels, or lands to the value, then to be imprisoned by a year. If the penning had been *Vice versa*, the person shall be imprisoned, except he pay 40 pound, or such as are able shall pay money, such as are not able shall be imprisoned; could there have been any doubt? and this is as much. It had been said: If it had been this: such as will not pay. For the fault here is in her power, as the Stat. speaks purposely, not in her will.

16 all. 6. The wife imprisoned for force, 9 H. 4. 6.

And upon the Stat. 1 Eliz. against bearing of passes. 2 Eliz. Dier 203. the judgement and statute is, that the offender shall forfeit an hundred marks, and if he pay it not within six months, then to be imprisoned; It was never doubted, but to extend to women covert; So it is in that Book.

And 1 El. c. 2. every person failing to go to Church, was enacted to forfeit 1 s. d. a Sunday to be levied by the Churchwardens, for the relief of the poor, of the goods, lands, & tenements of such offenders by distress. This extended to women covert.

Then 23 Eliz. the 20 pound a moneth was given for this, and if they were not able, or failed to pay, then to be imprisoned till they paid. The woman covert is within the Statute. *Fosters Case.* Co. lib. 11. fo. 61.

And 7 E. 3. 11. I hold to be a case in the point; One brought a Writ of Ravishment against the Master of Burton Lazar and two confreres, which were two persons in law. These two confreres, were apparently to the Court as un- able as a woman covert, yet there was no challenge, they were not within the Statute, but exception was taken to the clause of the Writ, commanding the Sheriffs to have the body to render, to which of the plaintiffes or defendants he should belong, whereas to the confreres he could not belong; which was excused, that the form of the Writ was determined by the Statute, & added that in a sort they might seem a little interested in the behalf of the Hospital. And if the plaintiff were barred, the Ward should not be adjudged to the defendants. And if the Master had joyned his confreres with him, in an action of Ravishment, it had abated, so they cannot demand without interest, but they may do wrong without interest.

And 14 H. 6. 17. A Writ of Ravishment is brought against a husband and wife and admitted, and other matter pleaded in bars.

And if in this case Doctor Hussey had been found guilty with his wife, no doubt they should both have been condemned; And yet for her single person, the case had been the same that now it is, that she could not by her self satisfy, yet she should have been imprisoned, except her husband had satisfied. The case of 38 H. 8. Ror. 347. *Comes Rusl' vers. Savage & sa fem.* And Co. l. 5. 14. *Eytues case of Amnity* recovered against a person, by consent and aid of Patron and Ordinary. It is a just Rule that Judges are to make such exposition of Laws and Statutes, as suffer them not to be elusory. C. l. 11. *Magdalen Coll. Case.*

Statutes that are made in imitation, or supply of Common law, shall be expounded



pounded according to the law, and such a Statute is this. And if a woman sole ravish and then marry, the reason is all one, for there the fact is the witness, and must be so laid on her alone, and not upon her husband; And therefore in that case, if the husband pay not the value, she must be imprisoned. But it seemeth that the value of the marriage being found, the husband must answer it, and so it is out of the case of the Statute, and not like the principal, for the husband can satisfy, yet the words are, *Si ille qui rapuit de Maritagio satisfacere non poterit.*

Now to the case 23 E.3. F. Corone 276. that a sponk of a woman covert being appealed malleously and found not guilty, shall yet have no damage nor inquiry against the abettor. The words of the law Westm. 2. cap. 23. are, that the person appealed shall have damages, now they can have none; there is incapacity indeed in the very point, yet a woman may take any thing to the benefit of her husband. The words are that the party appealed shall have damages for his imprisonment and infamy, which reach both to a woman covert, and for the like as with her husband, and she alone after his death shall have action, and the damages recovered by and for her, and therefore that case may endure question.

And it is of no weight that is said, that where the books of 8 E.3. 32. and 22 R.2. doe enquire of the sufficiency of the defendants, which cannot be in this case, because the woman covert appears to the law insufficient; For therefore that point of inquiry is saved, and the judgement peremptory upon the other. And so though the Stat. of West. 2. c. 13. give an Appello; damages, you must not inferre thereof that an appeals cannot be had, but where the Appello; may have damage, for the contrary thereto; appears 22 E.3. Cor. 276. *Quare* of the precedent judgement against husband and wife *quod capiuntur*. Tr. 34 H.8. Ro. 347. Salop.

As to the second great point, whether the verdict be sufficient or not? I make two questions of it.

First, whether the Ravisher shall be answerable for the value of the marriage, though he were not the author of the marriage, but some other without his assent, or the Ward of his own will marry himself, for if the law be so, then is there no want in the verdict.

The second, supposing that he be not answerable, except he were Author of it, whether the verdict as it is, shall be taken so by intendment.

To the first. At the Common law, and before the Statute of Gloucester, c. 1. If A were disseised by B, and B disseised C, or were disseised by him, A had no remedy for damages against the feoffee, or disseisor of his disseisor, but was to bring his assize against B which was the immediate disseisor, and therein he was to recover the mean profits by way of damage, not onely for his own time, but also for the profit received by the feoffee, or second disseisor.

And likewise if A the first disseisor had re-entred whereby he had lost his assize, he might by an action of trespass *vi & armis* brought against his disseisor, recover the mean profits for all the mean possessions, but neither at the Common law nor now can he recover upon his re-entry damages against the feoffee, lessee, or second disseisor, by action of trespass *vi & armis*, for that fits not his case as to them who did no immediate trespass.

And therein the Common law doth no wrong to charge the first disseisor for the profits not received by him, because the first disseisor had no remedy for them against the second disseisor, or the feoffee. But the first disseisor had remedy by action against the second disseisor, or was supposed to have received satisfaction at the hands of the feoffee or lessee, and so paid but where he received.

But now the reason is clean other in the case in question, for the ravisher of a Ward by his ravishment gains no interest in the body or custody of the Ward, neither doth the true Guardian lose his possession by the ravishment. And therefore if my tenant by Knights service die, his heir within age, I am presently in the possession of the body without seisure; And therefore the trespass at the Common Law, nor the Writ of Ravishment now, doth not as in other Actions of trespass renounce the property or possession of the Ward, but doth only punish the *Temeraria occupatio*, and gives the plaintiffe damages according to his hurt, by abuse or marriage of the Ward. And in this case, if another take away the

The woman may take any thing to the benefit of her husband,

Second great point.

Verdict taken by intendment.

To the first question.

Coke li. 1. Liffords case, 31.

the Ward from the ravisher, and marry him, the first ravisher can have no action against the second, but the very guardian may have action against them both, and recover against them both for their several ravishment. 8 E. 3. 52. where it is said that four ravished, and a woman knowing of it did marry him, and they were all charged with the value; so of the person of a man there can be no possession without a right. And therefore Littleton in his chapter of Confirmation says, that if a man take away my villain in grosse, and I confirm his estate in the villain, the Confirmation is void; but I may give him by words *Dedi & concessi* to him that took him away or to any other notwithstanding such wrongfull taking away of him; which will be clean contrary to the wrongfull taking away of my man or any other like thing.

And this is by law of nature, by which all men are free, and cannot be brought under the dominion of any, but according to *jus gentium*, viz. in case of captivity, from which our villenage came. And the confession in court of Record is not so much a creation as it is in supposal of law a declaration of rightfull villenage, because as a confession of other actions, though it is true as Littleton says, that it shall not binde his issues born before, because the favour of liberty gives them leave to falsifie. They were called *servi* not *a serviendo*, but *a servando*.

But all this notwithstanding I am clear of opinion, that if one ravish my man, and take him out of my possession by wrong, and after that another takes him from him, and marries him, or he marries himself during his nonage; that in this case I shall and may by a writ of Ravishment of Ward brought against the first ravisher recover not only damages for the taking of him away, but also the value of the marriage. And this is to be maintained by reason, by president, and authority of books.

The reason: for he that observes well the nature of the case must confesse, that the value be not given against the ravisher for the marriage hapning after (whether and by whomsoever) he shall make the law utterly cloy in point of marriage, for there is no creature so moveable, so easily and closely to be conveyed and kept as a man, so as he may be sold from man to man to a hundred in a short time, his marriage may be clandestine out of the Church, and yet such as is many at it, and so covertly handled, that it shall not be possible to assign the certain person that was the author of the marriage, or else that offence may be assigned to him that is unable to answer the value. As in the case of a woman ravished, if her husband were not answerable as before. And the ravisher hath no more if he be made to answer the value of the marriage, though he had it not, in the true guardian less if by his means. And I do not regard what the wrongdoer gains by his wrong, but what the owner loseth by it, when the law runs to punish the wrong. For if the Statute of Westm. 2. cap. 14. say well, *Caveat emptor mihi quare non debuit quod jure alienum emit*, much better may it be said here, *depredate raptor qui ignorare non potuit quod pupillum alienum abduxit*. And this is a just use of law in odium *spoliatoris*. See Conradus Lagus de *plagiariis*. If A corrupt the servant of B, who thereupon purloins from his Master, the corruptor shall answer the losse in Duplo, whatsoever becoms of the goods. Upon the reason here, see the like there. 456.

For presidents: in books of Entry, in books of Law, though sometimes the Question to the Jury in ravishment of Ward be by whom he was married, which cannot be but well, as old book of Entries in ravishment 11. 17. & 18. the book 33 E. 3. f. Judgement 251. found marriage, but no value, nor by whom married, and so no judgement could be given for the value, but for the damages onely; yet the more books and presidents by much, are married, or not, generally, without asking by whom. And the answer of the Jury in most cases is, That they know not whether married or not. [yet note, that it is much harder to find by whom married, then whether married at all;] therefore they make their verdict conditionally, if married, so much for the marriage besides damages; if not married, the body, and so much for damages onely. And then the judgement is conditionall, but for the body and the damages. And if the Sheriffe return that he is married, then the plain-

*Praxis Iudicium  
est interpret  
Legum.*

plaintiffe shall have a *sciens fac.* for the value of the marriage found by the Jury. 33 H.6.3. & 45 E.3.16. And 9 H.6.61. Babington asked the Jury whether the Ward were married: generally, they answer, No; yet the verdict is made conditional, so much for the value if he be married, generally, without saying by whom.

Note in these cases where there is no marriage found, and yet the verdict gives the value, if he be married, or shall be married before he can come to the age by unmarried, it follows that this must extend to marriage by whomsoever. As the same effect to 21 E.3.44. & 19 E.3.8. Judgement 123. & 19 E.3.112. Judgement 172. & 17 E.3.8. Judgement 116. 29 E.3.24. Coke lib. 2. cap. 1. *scilicet ultimo in raptusment.*

All these books and precedents are of marriage found generally, not saying by whom.

If a Ward be raptusment within age and a writ of right of Ward be brought, the defendant may plead that he is come to age, bringing the writ, for then he is to demand the body as a Ward. But if it were a writ of raptusment of Ward, it would be otherwise, 9 E.4.30. 37 H.6.7. & 24 E.3.49. And the old book of *Chiriac Ward en raptusment* 18. enquires whether the Ward were married, or come to full age, as inferring, that though he were not married, yet if during the raptusment he were come to full age, the raptusment should answer the value, because the guardian could not now have his marriage.

Also Coke, lib. 1. cap. 1. *Raptusment ult.* the raptusment was condemned in the value, when the Ward died unmarried and within age after the raptusment, by the guardian lost the marriage. But note the Statute of Westminster. 2. cap. 35. in question, is expresse in that case, so that case may grow by force of the Statute.

Another point is, that if the Guardian gets the possession of his Ward again unmarried after the raptusment, he may have damages for the taking, but he shall not have the value against him upon the raptusment. The reason is plain, and for that see 27 H.6. gard. fo. 118. which in the present old book of *Chiriac* gard. tit. *Raptusment* pl. 12. and the old book of *Chiriac* gard. in *Raptusment* 11. where the Jury finds *inter alia*, that the guardian could never have the possession of the Ward after the raptusment.

But touching this principall point how a raptusment shall be charged with the value though another marry the Ward, the two great cases relied upon, and passed by me by way of distinction were 8 E.3.35. & 8 E.3.47. In the first is: one brought a writ of raptusment against four men and a woman, they all plead not guilty, and the Jury finds that the four men raptusment the Ward and not the woman. But they finde withall, that the woman knowing of the raptusment did marry him to her daughter, and the Court condemned them all in the value, whereof the consequence must be, that though the marriage by her might be holden of it self a raptusment, and so they all guilty as of severall raptusments, yet they could not have been condemned in the value, being no parties to the marriage, but that they were made liable because the marriage was made whilst the rest stood deforcees and raptusmenters.

And note that the Statute binds the raptusment with the title *cujus estis melius fidei possessor.*

But the other case 8 E.3.45. was, that one brought a writ of Ward against Alice, and demands R. son and heir of I. as his Ward; Alice came in, and she said, that she claimed nothing in the Ward but nurture, and now in the Court she tendered him to the plaintiffe, who refused him because he was married; he answered, he was not married by her, the other replied, that he was married in her ward, after she became deforcee, for which time she was to answer. Unto which it was said for her, that in as much as she came latefully to the possession of the Ward, and did tender him at the first day, she could not be counted a deforcee, and so she was not amerced. But there was judgement by agreement that she should recede the Ward and 20 pound, for here she was clean contrary *bona fidei possessor*, and therefore was not to answer but for her own act; for her possession.



posſion, being from the beginning laſtfull, and without wrong, cannot be wronged to other mens wrongs.

Now ſo in concluſion upon ſolemn and ſereral arguments of all the ſeore Judges, judgement was given for the Plaintiff, with a full and uniform conſent of the whole Court, Nichols, Winch, Warburton, and my ſelf, which judgement was given and pronounced in the Court Paſch. 14 Reg. Jac. &c. and entered thus :

*Ad quem diem hic venerunt rursus prae. Franciscus quædam prae. Jac. & Katherine, Robertus, Johannes Woodford & Cuthbertus per Advocatos suos prae. Et super hoc ubi promissis, & per Justiciarios hic plene in vestigio, consideratum est quod prae. Franciscus recuperet versus praesentis Jac. Katherine, Robertum, Johannem Woodford & Cuthbertum libris pro valore Mercedis prae. & damna sua prae. ad decem libras & decem solidos per jurat' prae. in forma prae. assessa, nec non quadraginta libris & decem solidis eidem Franc' adquisitionem suam pro missis & expensis suis prae. & Cuthbertum de incrementis adjudicat. Quæ quidem valor & damna in tota se adiacentia ad obtingent' quinquaginta & novis libris. Et prae. Katherine, Robertus & Johannes Woodford capiantur ad habendum prisonam duorum annorum juxta formam hanc, &c. Et prae. Franc' in misericordia pro falso clamore suo versus praesentis Jac' & Cuthbertum de transfer' & rapin' prae. unde prae. Jac' & Cuthbertus per Jur' prae. fuerint acquies, existant & regantur eidem Jac' & Cuthbertus sine ulla sua die, &c. This judgement was reversed in the Kings Bench, only, because there were no writs de proseguendo entered to the plaintiff, for they took it not to be within the meaning of the Statute of Jeoffails, because they held it a penal Law, and so stopped. But Haughton Justice, was of a contrary mind. The point must be in the certain imprisonment of two years, for the roll is but as in trespass at the Common law.*

This judgement reversed in the Kings Bench.

G. Digby against Martha Fitzharbert.  
Tr. 13 Jac. Rot. 2560.

Derby.  
Waller.

George Digby brings a *Quare impedit* against Martha Fitzharbert, and declares that Thomas Fitzharbert & his wife were seised of the manors of Narbury with the advowson in fee, and presented one Brown; and then granted the manor and advowson unto the plaintiff, and now Brown is dead, &c. Martha says, that Thomas Fitzharbert Knight, was long before, &c. seised of the manors, &c. in fee, and presented one Murrain, and afterwards infeoffed one Richard Fitzharbert in the manor, who conveyed the said manors unto the said Tho: Fitzharbert for the life of one Bamford the remainder to one Anthony Fitzharbert in fee, and then Murrain died, and Thomas Fitzharbert presented Brown, and then granted the manor and advowson unto the plaintiff, and then Bamford died; and then Anthony Fitzharbert entered, and made his will, and gave the manors, &c. unto Martha for her life, and died, and then Brown died; and then she presented the Clerk, and traversed without that that the said Thomas Fitzharbert at the time of the grant made to the said George Digby was seised of the manors in fee, &c. *pross.* &c. The plaintiff replied and maintains his Declaration, and traverseth without that that the said Thomas Fitzharbert at the time of the grant made by him unto the plaintiff, was seised of the said manors for the term of the life of Bamford, *pross.* the defendant alleged, and thereupon it is demurred in law.

*Quare impedit*, declared upon seisin and presentment avoided, and the seisin also traversed.

The case in the argument I divided into four Questions.

The first Question, whether the defendants plea had bin good without traverse of the seisin in fee.

1.

Another Question, whether the defendant have not election either to traverse or not, but to leave it as a confession and avoidance, and then the traverse hath some aply, as it is on the other side.

2.

A third; whether the now defendant having taken a traverse, hath not so lock'd up the plaintiff as he hath no choice but to forego upon that to avoid finally.

3.

Lastly, whether if the plaintiff hath power to refuse to traverse the defendants in.

4.

To the first  
point.

inducement to his traverse, yet he hath taken that traverse right, or ought to have given it more scope by a *modo & forma*.

To the first, 26 H.8.4. by the opinion of Fitzharbert, is that upon such a count of seisin in fee, &c. in a *Quare impedit* against Prior the defendant pleaded a grant to the plaintiff of a *prochein* avoidance, the defendant needs not traverse the seisin in fee, because it was a confession and avoidance, *Quod nullus negavit*, which is less than a *concessum* only, *Qui tacet consentire videtur*.

It is true also that Brook makes a *mirum* of it in the abridgement of it, and 2 E.4.11. is to the same purpose thus:

In an assise if the defendant plead that I.S. was seised in fee and infeoffed him, the plaintiff may say that himself was seised in fee and granted unto I.S. for his life, who infeoffed I.D. upon whom he entered, without a traverse as being confessed and avoided.

And therefore I incline to hold the opinion of Fitzharbert, 26 H.8.4. for late, because that a presentment executed without more both makes a fee, and proves a fee, and therefore if the defendant shews that the presentment was such as neither made nor proved fee, it is a confession and avoidance sufficient.

For a presentment is indifferent and works as the root is from whence it grows. As for example, here as the plaintiff lays it, it is the fruit of an estate in fee, and so settles and proves a fee simple in the plaintiff, or in Thomas Fitzharbert that granted the next avoidance to him; but as the defendant makes the case now, the same presentment neither gave nor proved fee simple in Thomas Fitzharbert, but was under his title for the life of Bamford, and after made to the right of the defendant, according to her estate.

15 H.8. ff. Qua. Imp. 77. the plaintiff in *Quare Imp.* declared that his ancestor was seised in fee of the *span*, to which, &c. and presented, and then he brought the *span* to himself.

The defendant said, that long after that he was seised of the *advowson* in fee and presented, and now presented again, and holds good clearly without traversing the appendancy, for this latter presentment had confessed and avoided the appendancy.

And now upon this I hold, that if the defendant had not joyned the traverse to his plea, that his plea had been good, and the plaintiff might properly have made the traverse that he makes, for then the traverse had fallen properly to his turn upon an affirmative plea of the defendant, his traverse not being presented by the defendant's traverse.

2 Point.

But now to the second point. As I incline that the plea of the defendant might have stood without a traverse, so I am clear of opinion that the traverse added by the defendant is better and more sure than the other part of the plea without the traverse would have been. And note that M. 26 H.8. doth not lay in that case that he might not traverse, but (*ne besoigne*) he need not.

Now for this know that though it be true that a presentation may make a fee without more, that you never have a declaration in a *Quare Impedit*, that the plaintiff did present the last Incumbent without more, but you declare that the plaintiff was seised in fee and presented, or else lay the fee simple in some other, and then bring down the *advowson* to the plaintiff, either in fee or some other estate, and so are both 26 H.8.4. & 15 H.6.1. *Quare imp.* 71. before rectified. The reason thereof is. That a presentation alone in the plaintiff is *militans* and indifferent, and may be in such a title, as may prove that this new avoidance is the defendant's, and therefore you must lay the case so as by the title you make the presentation pass joyned to the title prove that this presentation is yours too. Why then observe, there is in this declaration two points materiall, *scil.* a seisin in fee and a presentation. To the presentation the defendant hath given answer by a confession and avoidance, but to the seisin in fee hath given no answer, but argumentally by two affirmatives one against another, and therefore the traverse to that is good, and without it, it is but *responsum dimidiatum*, and yet it is true that as well the presentation, as the seisin in fee, is to be answered for the cause aforesaid.

The

The caſe that moved me a little to doubt was this, that if I. S. be ſeiſed of an advowſon in fee, and I. D. uſurps upon him, now he hath gained the fee, and therefore when the advowſon next avoids again, the preſentation is his. Now if I. D. declare in his *Quare impd.* upon a ſeiſin in fee at the time of his former avoidance which he uſurped, that is falſe; and ſo the Defendant I. S. may by ſuch an inducement as is here, traverſe his ſeiſin in fee and triſe him and yet he hath the right.

To this I anſwer, that in that ſpeciall caſe, he muſt declare according to his oath, and to the truth, and not in the common ſojm; That is, he ſhall declare that I. S. was ſeiſed in fee, that the Church voided and he preſented, and now it is void again. As Fitz N.B. 33. If one recover an advowſon in a writ of right, he ſhall lay the laſt preſentation in the perſon againſt whom he recovered. So when a Patron ſues a *Quare Imped.* upon an Appropriation diſallowed. Now the caſes put by my brother Warburton, out of 3 H. 4. and 14 H. 6. 16. they are clear; for there the whole plea was confeſſed and avoided, and then he cannot adde a traverſe, which makes the difference, for the confeſſion and avoidance was but in part.

Now the caſes of late reſolutions are clearly for me, ſcil. 14 Eliz. Dier 312. & 33. & 31 Eliz. 365. Leaks caſe, which is much ſtronger; where a man having ſold himſelf ſeiſed in fee of a cloſe adjoining, upon the point of a treſpaſſe, in default of fence the other was allowed to traverſe the ſeiſin in fee, and yet any leſſe eſtate would have ſerved him for a licence to put his beaſts into the cloſe adjoining, but becauſe he took upon him to plead his own eſtate eſpecially, he gives advantage to his adverſary; and the caſe was judged lately between Newman and More *ſup.* which alſo had been formerly adjudged in that very point, that Traverſe may well be allowed, where the plaintife was beſore confeſſed and avoided, much more here beſore the point traverſed was no whit confeſſed.

Now to the third point; I hold it clear, for theſe rules muſt ſtand undoubted. *Third point.*  
*Alteri incumbit probatio, & melior & tutior eſt conditio poſſidentis;* for when you will recover any thing from me, it is not enough for you to deſtroy my title, but you muſt prove yours better then mine.

Why then take the caſe of 27 H. 8. 2. which is, that if one plead a falſe plea, and his adverſary traverſe that with an Inducement, which alſo is falſe, yet he ſhall have advantage of his traverſe. The caſe is there which is alſo in 15 H. 7. 2. in treſpaſſe, the defendant pleads, that the plaintife leaſed to I. S. and brings that ſuit to himſelf by aſſignment. The plaintife cannot traverſe the aſſignment, and if he doe, and it paſſe for him, he ſhall not have judgement, but yet in that caſe, if the plaintife convey himſelf to his own houſe by ſurrender, now he ſhall under the mean aſſignment, and have advantage of it, being the firſt ſaliſty. Now ſhall the defendant in that caſe come again, to have that traverſe, and traverſe the ſurrender? I hold clearly no, for that were infinite; and ſo I hold in the caſes cited beſore, ſcil. 14 Eliz. & 31 Eliz. and *ſupra* in this book Newman and Mores caſe, that there could not be traverſe upon traverſe.

7 E. 4. 26. 3ff. The defendant pleaded that I. S. recovered the land againſt the plaintife, whoſe eſtate the defendant hath by Rogers, the plaintife may ſay that I. S. enfeoffed him after recovery *abſque hoc*, that the defendant hath his eſtate, now the defendant cannot traverſe the feoffment to the plaintife.

Yet note in the caſe 27 H. 8. 2. if the defendant had pleaded not guilty, the iſſue ſhould have been found for him; Wherefore let a man take heed in pleading, for if he have the generall iſſue, and plead ſaliſty or unadvitedly, the other party ſhall be allowed his ſix replies or defences to the plea, and caſe, as it appears without reſpect to that that might have been pleaded better.

And note that there are generall iſſues, that need no inducement as *Not guilty; Nihil debet; ne diſturba pas*, which is the ordinary plea in theſe caſes. But if a man will leave the generall iſſue and controvert the title, he muſt enable himſelf by ſome title of his own to do it, but yet that is not the principall part of his plea, but

That that would ſerve upon a Not guilty may be loſt by ſpeciall pleading.



but a ſmall inducement onely, and therefore there is no ſenſe if you will quarrell my poſſeſſion and I avoid the title effectually (and ſo for my ſake muſt and doe induce that with a title of my own) that you ſhall ſite upon my title, or for ſake your own; for you muſt recover by your own ſtrength, and not by my weakneſſe.

So I ſay regularly, that whenſoever a Traverſe is taken apt and materiall to the plaintifes title, the plaintife is bound to it, and cannot for the ſame thing leave it, and ſo the defendant to accept another Traverſe tendered by him, and there is no caſe in the law againſt this rule as I lay it.

The caſes 20 E. 4. 2. 12 E. 4. 6. 1 R. 3. 9. are agreed, and the law and reaſon is clear ſo; if a man bring an Action of treſpaſſe, for breaking his cloſe on a certain day, if the defendant plead a Release of actions, he ſhall traverſe all treſpaſſes after; If a feoffment, he ſhall traverſe all treſpaſſes before; If a licence for once, all before and after. Now hath the plaintife choice to leave the traverſe, and traverſe the point of Juſtification, ſcil. the Release, Feoffment or Licence, or he may alledge a treſpaſſe before or after, and ſo joyn upon the traverſe offered. This is indeed a Traverſe after a Traverſe, but it is not a Traverſe upon a Traverſe, to the ſelf ſame point, as I gave my rule, and as the caſe is here ſo one ſame preſentation. For now note, when a man brings an action of treſpaſſe, for breaking of his Cloſe one day, he may maintain this action by any one of 100 treſpaſſes before his Action brought, which is the caſe, that though the defendant juſtifie for all that day, yet he muſt traverſe before or after, ſo now the treſpaſſe juſtified is one, and that traverſed is another. Now if the plaintife traverſe the point of juſtification, that is to one treſpaſſe, and is no traverſe upon a traverſe. If he doe aſſigne a treſpaſſe with the time of the traverſe, to joyn upon the traverſe, tendered according to my rule, it varies not in that point, from the firſt traverſe, ſee how clear this is.

The other caſe objected is Long, 5 E. 4. 100. as is well collected in the end of the caſe by Danby. A man brings an action of waſte for ſelling of trees, and lays that the leſſee ſelled and ſold them, the defendant confirms that he ſelled them, but ſaith, that he beſtowed them in repairing the houſe *abſque hoc* that he ſold them. The plaintife may reply, that he let them rot, or any like caſe of waſte *abſque hoc* that he employed them to reparations; and this indeed is directly to the ſame thing, and traverſe upon traverſe. But this I affirm clearly by another Caution of my rule, that this firſt traverſe was not materiall, nor to a point materiall, for the plaintife might have declared of the ſelling onely, and the other point was meer ſurplage. And therefore though perhaps if the plaintife had joyned upon it, and it had been found for him, he ſhould have had judgement, yet clearly he was not bound to the Plea, as not ſinall to the action, and therefore clearly in that caſe, the plaintife might have demurred upon the defendants Plea, as reſting upon a thing not materiall; in all which reſpects it differs clearly from the principall caſe we lately judged, between Sir John Sherley and his wiſe defendants, againſt William Wood, *ſup.* in this book. When the tenant pleaded a joynure made to the demandant, and acceptance of it after the husbands death, the demandant may plead a reſuſall, after the death of the husband, without traverſing the acceptance, for it was not materiall of her part to plead, but that muſt riſe of the part of the reſuſer.

When there remains no caſe objected nor to be objected to withſtand me, but Sapcots caſe cited 2 R. 3. F. iſſue 128. and the ſame 22 H. 7. Co. Reports 97. which is indeed the very ſame with the principall in 2 R. 3. it is but Townſend for the ſecond traverſe, and Cortesmore againſt it.

In 22 H. 7. it is repoſited that after debate iſſue was taken upon the ſecond traverſe. This is all the authority (which I value not) for no doubt but that iſſue may be taken upon it, but the queſtion is, whether it can be enforced, the party ſtanding, and demurring upon it as it is here.

Againſt this I oppoſe the Caſe judged Paſche 37 Eliz. Rot. 2278. Woodroffe brought a *Quare Imped.* againſt John Cotford for the Vicarage of Stepney in Midd.

Midd. and laid that one Richard Leighton, Parson there, wherunto the Vicarage belonged, did lease the Parsonage to Thomas Lord Cromwell, Gregory and Richard Cromwell for 80 years, and that Thomas and Gregory died, and that Richard survised, and gave the lease to his Executor for ten years, and the remainder to Francis Cromwell.

That the Executor agreed unto the devise to Francis, and after ten years he entered, and byings down that Interest unto the plaintiffe, who presented one Anthony Anderson, and now upon this avoidance he presents again, the term ending.

The defendant Cotford saith that Gregory Cromwell survised, and granted to the plaintiffe the first and next avoidance, and then granted his term to the defendants, and then the Church became void again, and so the defendant presented, and transferred *absque hoc quod pred. Richardus supervixit Thomam & Gregorium Cromwell prout, &c.*

The plaintiffe maintaineth his declaration in *omnibus absque hoc quod pred. Gregorius* did grant to the plaintiffe the first avoidance, *prout*, and then demurred; and after two or three Terms advice, it was adjudged that the Replication was insufficient in Law, and so adjudged *nihil Capiat per billam*; which is all one with the principall case, for the presentment for the plaintiffe was avoided as here, and yet they traverse the generall title of the plaintiffe, and that was the root of that presentment, which the plaintiffe was not permitted to make, and to offer a second traverse to that that did avoid his presentment, as the plaintiffe would here in the principall Case, so this is a full judgement in the last point.

Now to the last point. If the plaintiffe should be admitted to a second traverse, 4 Points, he should not have taken it so strictly and precisely to the estate for the life of Richard, because if the estate had been for the life of any other, who had been dead, or had been any otherwise insufficient, so that it could not contain the plaintiffes title to his avoidance, it had been all one, and therefore the traverse had been *absque hoc* that Thomas Fitzherbert was seised *tempore Concessiōis* & *forma prout, &c.* for that would have allowed the defendant to make out of any other seisin, that might have disabled the grant as well as the life of Richard: like unto the case of *Consimili caso*. Where the demandant counts of an Alienation in fee, yet the defendant shall make his traverse to the Alienation *absque forma*, and then the demandant shall maintain the issue by an Alienation *absque* in tail, or for life, for they are all alike materiall. To this there can be no answer given, but that the defendants plea upon that particular estate gives the plaintiffe his traverse accordingly; which I rejoyt upon the plaintiffe, for since he hath laid the seisin in fee, he hath given the defendant just advantage to traverse it.

This was my opinion and argument upon this case, and my brother [Winch] saying before had holden that the first traverse was well taken, and the second as well, so he and I agreed. But my brother [Nichols] and [Warburton] had argued to the contrary. And so it rests.

Lampleigh versus Brathwait.

Mich. 13 Jac. Rot. 712.

Anthony Lampleigh brought an Assumpsit against Thomas Brathwait, and declared, That whereas the defendant had feloniously slain one Patrick Malleson, the defendant after the said felony done, instantly required the plaintiffe to sue, and do his endeavour to obtain his pardon from the King, whereupon the plaintiffe upon the same request did by all the means he could, and many ways, but did his endeavour to obtain the Kings pardon for the said felony, viz. in rising and journeying at his own Charges from London to Roiston, when the King was there, and to London back, and so to and from New-market to obtain pardon for the defendant for the said felony, Afterwards &c. &c. in consideration

Assumpsit.  
London.

Assumpsit and  
of Consideration  
ons generally.

of the premises, the said defendant did promise the said plaintiffe to give him one 100 pound, and that he had not et. to his damage 120 pound.

So this the defendant pleaded *Non Assumpit*, and found for the plaintiffe, damage one hundred pound. It was said in arrest of judgement, that the consideration was passed.

But the chief objection was, that it doth not appear, that he did any thing towards the obtaining of the pardon, but riding up and down, and nothing done when he came there. And of this opinion was my brother [Warburton] but my self and the other two Judges were of opinion for the plaintiffe, and so he had judgement.

First it was agreed, that a meer voluntary curtesie, will not have a consideration to uphold an *Assumpit*. But if that curtesie were moved by a suit or request of the party that gives the *Assumpit*, it will bind, for the promise though it follows, yet it is not naked, but couples it self with the suit before, and the merits of the party procured by that suit, which is the difference. *Pasc. 10 Eliz. Dier 272. Hunt & Bates. Des Oncleys Case 19 Eliz. Dier 355.*

Then to the main point it is first clear, that in this case upon the issue *Non Assumpit* all these points were to be proved by the plaintiffe:

1. That the defendant had committed the felony *provis &c.*
2. Then that he requested the plaintiffes endeavour *provis &c.*
3. That thereupon the defendant made his proof *provis &c.*
4. That thereupon the defendant made his promise *provis &c.*

For wherefore I build my promise upon a thing done at my request, the execution of the act must pursue the request, for it is like a case of Commission for this purpose.

Difference upon  
on a promise  
past and to  
come upon a  
Consideration.

So then the issue found *no supra* is a proof that he did his endeavour according to the request, for else the issue could not have been found, for that is the difference between a promise upon a consideration executed and executory, that in the executed you cannot traverse the consideration by it self, because it is passed and incorporated, and coupled with the promise. And if it were not indeed so, it is *nudum pactum*.

But if it be executory, as in consideration, that you shall serve me a year, I will give you ten pound, here you cannot bring your action, till the service performed. But if it were a promise in either side executory, it needs not to wait performance, for it is the contract promise, and not the performance, that makes the consideration; yet it is a promise before, though not binding, and in the action, you shall say the promise as it was, and make a speciall averment of the service done after.

Now if the service were not done, and yet the promise made *provis &c.* the defendant must not traverse the promise, but he must traverse the performance of the service, because they are distinct in fact, though they must concur to the bearing of the action.

Then also note here, that it was neither required, nor promised to obtain the pardon, but to do his endeavour to obtain it, the one was his end, and the other his office.

Now then he hath laid expressly in generall, that he did his endeavour to obtain it, viz. in *equitando*, &c. to obtain. Now then, clearly, the substance of this plea is generall, for that answers directly the request, the speciall assigned, is but to inform the Court; and therefore clearly, if upon the trial he could have proved no riding, nor journeying; yet any other effectual endeavour, according to the request would have served, and therefore if the consideration had been that he should endeavour in the future, so that he must have laid his endeavour expressly, and had done it as he doth here, and the defendant had not denied the promise, but the endeavour, he must have traversed, the endeavour in the generall, not the riding, &c. in the speciall; which proves clearly, that is not the substance, and that the other endeavour would serve. This makes it clear, that though particulars ought to be set forth to the Court, and those sufficient which were not done, which



which might be cause of Demurrer, yet being but matter of form, and the substance in the generall, which is here in the issue and verdict, it were cured by the verdict; But the speciall is also well enough, for all is laid down for the obtaining of the pardon which is within the request; and therefore suppose he had ridden to that purpose, and Brathwaite had died, or himself, before he could do any thing else, or that another had obtained the pardon before, or the like, yet the promise had holden.

And observe that Case 22 E.4.40. Condition of an Obligation, to shew a sufficient discharge of an Annuity, you must plead the certainty of the discharge to the Court; The reason whereof given by Brian and Choke is, that the Pleas then contains two parts, one a trial per pais, *scil.* the writing of the discharge, the other by the Court, *scil.* the sufficiency and validity of it, which the Jury could not try, for they agree, That if the Condition had been to build a house agreeable to the state of the obligation, because it was a case all proper for the Country to try, it might have been pleaded generally, and then it was a Demurrer, not an issue, as is here.

Wilson against the Bishop of Carlile.

Tr. 13 Jac. Rot. 3474.

Prohibition.

Thomas Wilson brought a Prohibition against Henry Bishop of Carlile, and laid that there was within the Parish of Graystock, this custome for titheing of Wool amongst others, That if any inhabitant have five Fleeces of Wool above, that then such inhabitants after the hearing and binding up of the said five fleeces, *absque fraude & dolo fideliter solvent Rectori post monitionem, &c. quod si domus mansionalis ejusdem inhabitantis infra parochiam prad. Decimanum inde absque aliquibus visis vel tactis novem partium ejusdem lana resid. per decimam, &c. Habendum vel scrutandum in plenam, &c.* And that the Parson, hath so accepted it; And then lays, That the Bishop of Carlile pretending himself Parson or Commendatory, &c. the Bishop pleads himself the Parson or Commendatory of the Church by presentation, &c. from the Countesse of Arundell, and yet shews that his faculty and confirmation was so long as he should remain Bishop of Carlile, which may well stand together, that he may be Parson in soluto, yet qualified by his faculty to hold it but for a time, and then to this custome demurred in law. And it was this Term adjudged for the Bishop with consent; for the substance of the prescription is laid that the very true tenth is and ought to be paid without fraud, which is not prescriptible, for it is common right, then the sold point prescriptible is, that this is without viety or touch of the nine parts, which is in effect repugnant to the other, for when you have the truth in the former part, you lay the way to fraud in the latter; for it is against common reason that any man judge or divide for himself, and then take choice of his own division; Against the rule of partition Litt. For the truth of the truth depends upon the proportion it holds with the nine parts; And therefore to the partitioner, which is in the nature of an adversary to the Parson in this case, to set out a part for the tenth, which he only affirms to be just, is to give him merely power to tithe as he lists, and the prescription were as reasonable as to lay plainly, that they might set out what tithe they list.

Cumberland, Brownlow.

Custome of titheing truly without view of the person,

4 E.6.6. The Guardian that tenders a marriage, must present the person to the Ward. And it is a weak answer to say, that if it be not a just tenth he may refuse it, and sue for his due. For first he hath no means to be assured whether it be true or not; so his suit may be candleste, sure he may be, it will be fruitless: But the law was provided not directly to ingender, but to prevent suits, and therefore provides, that things be done by indifferent means and persons, that there be no just suspicion of indirect dealing.

If a man were Judge in his own Case and judged amisse, a Writ of Error would redresse it; so if a Bishop disturb, or would not admit the Clerk, he might be compelled; yet the Law provides better, that is, that you have your right,

and therefore that your means be such as is likely to produce it, you may challenge the Array of the polls, yet you shall remove the *venire fac'* to another Officer, as the Coroner, where the Sheriffe is suspected in Law by a provisionall Challenge afoze to avoid delay, which is a kind of injury.

Replevin.

Surrey.

Doubleness  
in pleading.

A vovry for  
rent service ac-  
cording to the  
Statute of 21  
H.8. upon the  
land admits  
plaintife to all  
pleas.

Brown versus Goldsmith.

Tr. 13 Jac. Rot. 607.

**T**homas Brown plaintife, against Thomas Goldsmith defendant, in a Replevin for taking a brass kettle at Cobham in Surrey, 21 Apr. 12 Jac. the defendant avoweth, as Bailiffe to the Dean and Canons of Windsor, that one Robert Parson held the place of the Dean and Canons, as of their Manor of Hampton Court in the said County of Surrey, and Middlesex, by rent and suit of Court; that Robert Parson being summoned, did not appear at a Court holden in the said Manor, that for suit he did distrain, and makes Commissions, as in land holden of the Dean, &c. the plaintife confesseth the seisin of the Dean and Canons and the tenure: But further saith that the seventh day of April, An. 9 Eliz. the said Dean and Canons did lease by indenture the said Manor unto one George Scidolphe from the Annunciation then past for the term of 51 years then next following; then he entered *ante prae tempus quo*, and was and is yet thereof possessed, the reversion to the said Dean and Canons expectant.

The avowant confesseth the lease to Scidolphe, but saith that by the said lease, all Leets, Lawdays, and Courts there to be held, and all manner of Fines, Rents, Reliefs, Escheats, Perquisites, and profits of Courts were excepted and reserved. And that Scidolphe being so possessed, did the 10 of Octob. 11 Jac. grant all his estate to one Butts; that Butts the 26 of March 12 Jac. by his deed shewed forth, did grant all Leets, Lawdays, Courts, &c. unto the Dean and Canons. And that they afterwards held the Courts, and the defaults of suits *in super*. And that Goldsmith did distrain for the suit.

The plaintife demurs for doubleness, and sheweth for cause, in that the defendant saith, the Courts be excepted, and also that the Courts be surrendered.

In this case Judgement was given for the plaintife.

First, it was agreed by us all, that the exception (in the original lease) of the Courts, &c. was utterly void, because the Manor by that name was granted which might not be recalled; and Manor it could not be without a Court, only in the Kings case it was otherwise. And by the same reason the surrender of the Courts was void, which were inseparable from the Manor, *scilicet* the Court Baron. But then it was insisted upon that the Plea was void, and not plausible by him being a meer stranger, for it was said that this was a suit service done from Parsons, the very Tenant, and for default of suit of Parsons, he did distrain. Now the plaintife conveyed himself no interest to the tenancy, but only as a meer stranger did intitle another to the service which by the books he cannot do, but plead only *hors de son fief*. To this it was answered and resolved by the Court, that this exception was true at the Common Law, when all avowries for service were to be made upon the person of the tenant.

And it is true if the Lord will hold the course of the Common Law in allowing to; For his choice remains unto him still to allow as at the Common Law, but if he will leave that way and take the benefit of the Statute to allow as upon land liable to his distress, (as here he hath done) and so handle it as a rent charge, then the Stat. is indifferent to both, that the other may defend according to the same rules, by the same reason, for now the party of the person tenant is removed on both sides, and the charge of the land is only in question.

*Legem feram quam ipse tulerit*, yet it is true there is no literall prohibition for this in the law of 21 H.8. but the meer consequence of reason changing, changed the law.

Now whether the avowing was only upon the land, as in the case of customary profits, as a fine for alienation, or of a rent charge, that the plaintife at the Com-

Common Law in ſuch caſes might plead any diſcharge though he were a meer ſtranger, and had nothing in the land; See 14 H.4.8. b. & 14 H.8.6. Halſpenies caſe judged.

The King and the Lord Hunsdon againſt the Counteſſe Dowager  
of Arundell and the Lord William Howard.

Chancery.

In Chancery there was a ſuit commenced by me as Attourney Generall in the behalf of the Kings majeſty and the Lord Hunsdon as the Kings Farmer in the Manor of Weſt Haſley and Aſalby in the County of York, againſt the Counteſſe Dowager of Arundell, and the Lord William Howard and his Lady; which cauſe coming to hearing after I was Chief Juſtice of the Common Pleas, my Lord Chancelor called to his aſſiſtance in the hearing of it, the Lord Chief Juſtice Coke and my ſelf, this cauſe being long, and had many hearings and iſſues delivered, and after long conſideration was this Verdict with ſpecial finding of the Lord Chancelor, and the Judges and ſpoken of the Role decreed in the King, wherefore the Decree is, with the reaſons thereof, adviſedly and openly penned and entered, as of this Trinity Term 14 Jac.

Of this Decree therefore at large I will ſay nothing but this, that the reaſon of the ſuit in Chancery was not for want of good title at Law (for it ſaid and ſhewed the Kings title to be merely by Law, by the attainder of Francis Dacres, whoſe land, the bill laid the land to be, of an estate in tail) but the cauſe of it was made, that the deeds whereby the ſtate ſeem to come to Francis Dacres were not extant but were ſeemingly ſuſpicious to have been ſuppreſſed and withheld by ſome under whom the defendants claimed, and therefore in the ſaid Decree ran, that the King and his heirs and his ſaid Farmer ſhould enjoy the land till the defendants ſhould produce the deeds, and the Court ſhould take further conſideration and order.

Chancery be-  
leeveſt meer  
titles in Law  
where the  
deeds are not  
extant.

But two points fell out in this caſe very worthy the obſervation.

Two points.  
First point.

The firſt ſheweth thus, Anno 35 H.8. there was great controverſie between William Lord Dacres and his children on the one part, and the heirs generall of Sir James Strangways, for the lands of the ſame Strangways. And ſubſequent in June 35 H.8. the King made an award between them, which award became it did not ſtate the lands accordingly, afterwards in March 35 H.8. an Act of Parliament was made for ratification of the Kings award, which was extant in ſerolls of Parliament; and now was certified under the great ſeal of Eng-  
land.

The exception to diſannul this Act of Parliament was thus: The Bill paſſed in the Upper houſe, by the conſent of the Lords, which was ſent down into the Lower houſe, and from thence was returned with this ſupplement or ſuperſcription on the body of the Bill, *A ceſſe Bille les communs ſont aſſentis avec la provision annexee*: But there was no prohibition extant upon record. But ſet very well with that ſuperſcription or indorſement, and with the regall aſſent, and without any proviso indeed is filed with the reſt of the Bills and the Kings aſſent unto it, and labelled with the reſt, whereunto the great ſeal is ſet, as the cuſtom is in private acts, which are not enrolled without ſpecial ſuit, as general acts are; for general acts are always enrolled by the Clerk of the Parliament, and delivered over into the Chancery; which involvement in the Chancery makes them the original Records, (as it was reſolved in John Scubs caſe) but in private acts the very body of the Bill ſtand and ſealed as aſſent, and remaining with the Clerk of the Parliament, is the original Record.

The principal caſe ſtanding thus, the defendants Council preſſed the Fourth book of the Upper houſe, for there was no Journal book kept for the Lower houſe till the time of E.6. Concerning this Bill which is thus in other parts: *Quarta Martii prima vice lecta eſt billa concernens the Kings award for controverſie between the Lord Dacres and the heirs generall of Sir James Strangways the younger, &c. Cui quidam billo proceros aſſerunt: Item hodie miſſa eſt ad*



*ad domum communem per regium Attornatum & sollicitat' bills, &c.* And after 18 Martii hodie allata est à domo communi Billa, &c. cum provisione eidem annexa, que prima & secunda vice lecta est, hodie commissa est Regio Attornato Billa. And after 28 Marti, missa est in domum communem per Attornatum Regium Billa, &c. And hodie cum procerum consensu & assensu cancellata est provisio pro heredibus masculis Jac. Strangways mil' billa cuidam cui titulus est, &c. See these three Aas, the sending of it to the Lower house, the bringing it from thence, and the cancelling of the Probiso, all on this one day 28 Mar. upon which they inferre that the Commons having assented with provision, had not assented to this Act without provision, the same being cancelled by the Lords, of their own heads. And so it is not an Act of both Houses, as it ought to be.

But it was clearly resolved by us all, that this exception was of no value, and considerit first by the Act it self without the Journall, next by the Journall.

The Act it self hath no mention of a Probiso, but in the Indorsement as before, wherein what the Probiso was (if any were) appears not. Why then if there were indeed no Probiso, the assent of the Lower house was absolute and perfect; for the referring of it self to that that was not, hurts not; and the mentioning of it doth not prove necessarily that there was such a Probiso, no more, but rather lesse then in the Earl of Leicesters case, Plow. 390. the mention and recitall of his attainder did convince the truth of it.

If there were a Probiso, yet it might be sundry ways salubrious though it be not extant, for first if it were lost by the fault or negligence of the Keeper or Clerk of the Parliament, that must not avoid the whole Act. But suppose that a Probiso were cancelled by the Lords only, yet it might be such a piece by it self as this Act that remains might be perfect and compleat without it.

And that three ways specially:

1. Because it might be as a part by it self of a severall effect from the rest of the Act, though all were not in one Chapter or continent of the Act; as it is resolved in Dive and Manningshams case, Plow. 65. upon the Stat. 23 H. 6. of *Wheriffes*.

2. It might be a Probiso merely idle, insoyp, as it is termed *flattering*, Plow. 564. in the case of Unton upon the Statute of *Willia*, and the Duke of Norfolks attainder.

3. Thirdly, the matter intended by this Probiso might be so sufficiently provided for by the Act it self before, as this were meer surplusage, and then the omission of it could not prejudice. And to that opinion inclines 33 H. 6. 17. And that may seem to be the truth of this, for the Probiso seems to have been only to preserve the right of the heirs males of Strangways, whereas there was a generall saving in the Act as it came from the Lords, which served them as well as others, and that perhaps might be informed to the Lower house by the Kings Attourney the 28 of March, when he carried it to them, as is said; which might be the reason of the cancelling of it.

So this is the state of this Act, as it appears any way in the Record; out of which nothing can be enforced to annihilate the Act. And it doth not appear that the Lords did cancell the Probiso, but that it was cancelled the 28 day with their consent, which 28 day it was in the Commons house, and brought from thence *ut super*, so it might be cancelled there, and the Lords after consent to it. And all true and proper. And note that there is a Journall of that time of the house of Commons, and the Lords enter not in their Journall the Acts of the Commons. When take the Journall, it hath no mention of the effect of the Probiso, but in one place, and that is only by way of a summe, not of a full and formall sentence. For if the Probiso were indeed in no other form then is mentioned *provisio pro heredibus masculis, &c.* it were senseless and void, and no man may divine what it was to the avoiding of an Act otherwise perfect. But now suppose that the Journall were every way full and perfect, yet it hath no power to satisfy, destroy or weaken the Act, which being a high Record must be tried only by it self *Teste meipso*. Now Journalls are no Records, but remembrances for forms of proceedings to the Record, they are not of necessity, neither have they always been:

They

They are like the Dockets of the Writs of the particular to the Kings patents, Co. lib. 2. 34. & 16 Eliz. 33 1. of the particular. The last intended Parliament 10 Jac. if you be judged by the Journall, it was a large and well occupied Parliament, yet because no Act passed, no Record is of it, it was resolved by all the Judges to be no Parliament.

The Journall is of good use for the observation of the generality and materiality of proceedings and deliberations as to the three readings of any Bill, the difference between the two Houses, and the like, but when the Act is passed, the Journall is expired. And in this Journall there appears but one reading of the Bill in the Upper House where it passed, which is unhelpful. But if the Record of the Act itself carry his words wound in it self, then it is true that the parchment, no not the great Seal, either to the original Act, or to the exemplification will not serve, as in the 4 H. 7. 18. where the Act was by the King with the consent of the Lords (withstanding the Commons) and was judged therefore void. And he that observes the case 33 H. 6. 17. which was the only case relied upon by the defendants Comdell, shall finde it so; and upon this rule the doubt to be resolved, *scilicet*, upon the Parliament Roll it self, not upon the Journall.

For the case was, that Sir John Pilkington being charged with a Rape, and by Parliament passed, that he should be proclaimed, and if he appeared not within day, he should be attainted of the fact, and pay a fine to the party grieved. Now being taken and brought into the Kings Bench, he alleged that the Act (whereof a transcript was sent by Maitland out of the Chancery into the Kings Bench) was not a sufficient Act of Parliament in Law, for the Act began with the Commons and there passed, and was indorsed (*soit baillie aux seigneurs*) but when the Bill was, that Sir John Pilkington should answer before Pentecost and the Lords indorsed the Bill thus.

The Lords granted or assented that he should answer before Pentecost 1452, which was the Pentecost twelve month. For the Pentecost next ensuing, taking this Bill to pass as of the first day of the Parliament and thence sitting in Parliament, for the Parliament began before Pentecost 1451, and the Lords the Pentecost 1452, and so said the defendants there these two differing the Bill should have been returned to the Commons to allow or not. Peter Priour of Markham ask if the Bill came into the House after the Pentecost that in and during the Parliament, he conceiving that then Pentecost next ensuing mentioned in the Bill of Commons should not have been in Latin, that Pentecost, but the same the Lords made a year after, and so needed no return to the Commons for a new consent, but if *à converso*, then otherwise. But that by latter judgments is clear, that all Bills take effect and work from the beginning of the Parliament or Session except it be otherwise ordained by the Act it self. But in this case it is plain that the difference appeared in the body of the Roll of Parliament, not by a Journall book. And the very certainty of the difference appears in the Roll, which appears not so much as in the Journall in this our case.

And yet Porteseue Chief Justice of the Kings Bench after all done resolved in that case 33 H. 6. 17. that it was an Act of Parliament, and they would be well advised before they annulled an Act of Parliament, and peradventure it were best to reserve it to the next Parliament.

The other great point resolved in this present case, was, that whereas this title between the King in the right of Francis Dacres stood partly upon the said Act of Parliament, and partly upon a feoffment made by William Lord Dacres, Ann. 4 & 5 Ph. & Mar. and a re-intoftment back again, whereby the State was to grow to Francis Dacres, which feoffment the defendants said was not lawfully executed; and that point had been examined before the Council at York, in the eighth year of the late Queen Eliz. the defendants required the use of the said depositions, which the Kings Council contended ought not to be granted unto them, and so the whole Court resolved for others reasons contained particularly, and at large in the decrees; which were these:

Because the suit was by English Bill in the very nature of a Replevin to try the

The other great point,

Depositions  
without bill  
and answer.

2.

the title of freehold of a whole Barony in effect, without any mixture of equity at all.

Because it was between strangers to the remainder of Francis Dacres, by which the King claims, for there was three sons of William Dacres stated, before it could come to Francis.

3.

Because the point put in issue was an estate tail supposed by Thomas Lord Dacre (the eldest sonne of William Lord Dacre then dead) in the time of H. 6. whereby he pretended the feoffment should be as by a Remitter avoided, so the feoffment was not denied but admitted, and yet the tail was not a whit examined nor proved, but all bent to destroy the feoffment, so that it was said, that those depositions smelt of practice, and upon motion ought to be suppressed, and therefore ought not here to be allowed.

4.

Because the Originals of those Depositions at York were all gone, and there were also no exemplifications of them but in the hands of the defendants, so that the King must fight with weapons assigned him by parties adversary.

5.

That this very point had been by the late Queens commandment very carefully examined in Chancery 28 Eliz. only upon Petition, without bill and answer, between Francis Dacres the Petitioner, and the Earl of Arundell and his Countesse, and the Lord William Howard and his Lady defendants, as they are now, wherein all the Interrogatories were appointed to be perused by the Chief Justice and the examinations made not by the examiner, but by certain Doctors of Law. At which time divers of these witnesses that had been examined 28 Eliz. were examined.

6.

Those depositions were little questioned by the defendants Council, but were clearly allowed and read by the Court, though they were without bill and answer, for they were by speciall direction in that cause for execution.

7.

8.

They were with such careful proceedings and reverend persons as before.

They were by consent of parties, and the then defendants examined very many witnesses therein. But out of this curiosity it was enforced that the other depositions taken no man knows how, were then either not known or not regarded, nor ought now to be allowed.

9.

Depositions  
taken in the  
Court of the  
Councell at  
York in case of  
freehold, refused in Chan-  
cery.

But the great and main reason that they were not allowed to be read here was, because the Court where they were taken was not holden competent, in a case of this nature, and for depositions to be read in other Courts.

And we all held it dangerous to give a precedent in this Court with such assistance, and in such a case. And though it did not appear whether their instructions then bore it, yet the reasonings of late prove, that it was not allowable.

And though it were said that those depositions were allowed and given in evidence by the Lord Coke then Attorney Generall in 36 Eliz. upon an Office at Carlisle taken before my Lord Chancellor, then Master of the Rolls, upon the attainder of Francis Dacres; which was also confirmed by my Lord Coke; yet that moved us little, both because the case differs much between an Inquest of Office which admits a traverse, and this hearing which is final. And also because it is now contradicted and put to the judgement of the Court, which must give answer judicially, which before passed in silence.

Trespasse.

Tasker versus Salter.

H. 13 Jac. Rot. 2311.

Verdict as  
gainst Law  
whether it can  
save by the  
statute.

Tasker brought an Action of Trespasse of battery against Salter, the defendant made justification by conveying himself an estate by Copy, in a piece of ground, parcell of the Manor of Church-house, whereof Master Dean was seised, and the plaintife came upon it, and he laid his hands moliter, &c.

The plaintife replied and conveyed himself also an estate by Copy of another peece, or parcell of the same Manor, and then laid that the same Master Dean, &c. Lord of the said Manor, had had for him and his Tenants of this peece of ground,



ground, a way over the defendants peere, &c. And thereupon iſſue taken and found for the plaintife.

And the better opinion of the Court was, that this was not holpen by the plainte, becauſe indeed this was no iſſue at all, nor thing nor poſſible ſuable, and therefore the verdict muſt alſo be utterly void, for a verdict cannot make that good, that the Court ſees cannot be in law, ſo, that this is the office of the Court to judge. But payment pleaded to a ſingle Obligation, though it be not a ſufficient barre, yet it may be both in fact and in law.

And though it were ſaid, that the ſubſtance of the iſſue was no way. And if it had been laid in the iſſue by way of cuſtome, the ſame evidence would have maintained it. So it was not, but an Error in form.

To which I answered, that ſince it is put in iſſue as beſore, ſo as it cannot ſand in law, their verdict alſo is not to be taken againſt them, to make them ſubject to an attain, if in another ſenſe it be falſe.

And I ſay that if they had found a ſpeciall verdict that the cuſtome had been in the way as it ſhould have been pleaded. *Et ſi, &c.* The Court would not have given indgement, as if the iſſue had been found for the plaintife, for the ſpeciall matter of the Cuſtome, did not bear the iſſue, as it is taken upon a preſcription hold in law. And ſo upon the matter, it is a verdict without an iſſue, and out of the compaſſe of the iſſue.

Stukeley verſus Vnderhill.

Replevin.

Richard Stukeley plaintife, and Thomas Underhill defendant, En Replevin le defendant, avow pur damage ſeſant le plaintife plead que il luiſt ſeſi in ſee deſon meſſ. & terre & d'un Acre d'un autre meſſ. & terre. And that they two, and all thoſe whoſe eſtate, &c. had common of feeding, &c. in the place and then conveys to himſelf the other houſe and lands for years, and then juſtifies the paſſing in of the Beasts, le defendant traverse the preſcription and found for the plaintife. And though this preſcription thus conſeſed for ſeverall was groſſy faulty, yet the verdict did ſalve it by the Stat. This was this Trinity Term.

Verdict upon an Iſſue conſeſed. Quere if this land had been upon Demurrer general.

Kent & Hall.

Obligation.

Between Kent and Hall, Mich. 42 & 43 Eliz. Rot. 908. in debt upon an obligation upon condition to pay ten pound ten ſhillings, the defendant pleads payment of ten pound ſecundum formam conditionis, forque iſſue, and verdict for the plaintife, and yet repleader was awarded. See a like in Quare impedit betweene Danby and the Archbiſhop of York, Hill 7 Jac. Regis Rot. 909. & 902.

Iſſue not joined a right.

Juſtice Warburton reported a caſe of one Armeſeyes, when doſwer was brought againſt the Feoffee of the husband, who pleaded Detinue of Charters; which is no plea but for the heire, whereupon iſſue was taken, and the verdict for the defendant, and Judgement given for the defendant, and Error brought upon it, but he could not tell what became of it.

Iſſue inſufficient.

After verdict it was moved, that the Habeas Corpus was returned Barthol. miles, vic. & Michael which was the Sheriffs ſurname omitted. And it was amended by rule.

Amendment by putting the Sheriffs ſurname to a return.

Chancery.

Don Diego Servienti de Acuna the Spaniſh Embaſſador  
 againſt Sir Rich. Bingley.

Don Diego ſervienti de Acuna the Spaniſh Embaſſador, exhibited his Bill in Chancery againſt Sir Richard Bingley, upon the caſe ſupra, as Procurator generall for all the King of Spains Subjects, and laid the goods to belong to the Subjects of his Maſter generally, without naming any perſons certain, and then laid the ſpoil at Sea there, &c.

Embassadour  
how he may  
deal as a Pro-  
curator or not.

The defendant demurred upon the Bill, and it was referred to my brother Nichols and my self, scil. the demurrer by my Lord Chancellor, we heard Serjeant Mountague for the Embassadoz, and Serjeant Crew and Hutton for the defendant; and we were of opinion, that the Embassadoz was not to be answered to this Bill, for (to omit that a Procurator ought to sue in the name of his Principall,) no man can make a Procurator for me but my self; therefore the King cannot make a Procurator for all, or any of his Subjects, without their allowance; that is for the part of the plaintife. Again, on the part of the defendant, the Embassadoz neither by release nor sentence, can discharge him against the Principall, from whom he hath no Procuration. Again, the office of an Embassadoz, doth not include a Procuration private, but publique for the King, nor for any severall Subject, otherwile then as it concerns the King, and his publike Ministers to protect them, and procure their protection in forein Kingdomes, in the nature of an office, and negotiation of State; and therefore they may and ought to mediate, prosecute, and defend for them or any one of them at the Councell Table, which is as it were a Court of State. But when they come to settled Courts, which doe and must obserbe essentiall forms of proceedings, scil. processus legitimus, then they must be ruled by them, and not confound all Rules; except some Presidents could be found in Chancery.

But we made no report, because we advised another course, whereunto both parties consented. And we the Judges of the Common Pleas, where this cause depended by Prohibition appointed a Suit by consent in Chancery onely to examine witnesses, and then we to determine the Cause, as Judges of our own Court Arbitrally, not by warrant of any order of Chancery.

And so a large Bill being founded, onely upon our order and consent of parties, we made a small order, whereof the main was, that 200 pound was to be paid to the Embassadour, he giving security of a much greater summe (because the Embassadoz had made a high estimate; and indeed the goods (not allowing just defalcations of spoils, salvage and other things) was 2600 pound, or 2700 pound) to secure the defendant against all Proprietaries, and other claimers. Vide supra.

Scar-chamber.

Bradshaw and Salmon.

Covenant.

Breviats to Juries.

In the Star-chamber between Bradshaw and Salmon in an Action of Covenant, the same Salmon had upon the trial, delivered Breviats to the Jury, by means whereof 200 marks damages were given against Bradshaw. Now the plaintife, when it appeared, that there was no cause of damage in effect, but onely somewhat must be given, because the issue by not pleading the truth in form was passed against him, and though the plaintife in this case, had an ordinary remedy in law, by Attaint for excessive damages, yet for the difficulty of proceeding in Attaint, the Court gave him 160 pound damages here; Note that the Jury were not defendants, which yet they might have been here in respect of the Breviats received. But I hold that a Bill against them onely for giving of excessive damages could not lie.

Bill cannot lie  
against a Jury  
for giving ex-  
cessive dam-  
ages.

Anonymus.  
Star-chamber  
admits no fo-  
rein depositions  
directly  
nor indirectly.

In a suit in the Star-chamber, Witnesses were examined to prove, what was deposed concerning a Will in the Ecclesiasticall Court; But because Depositions are not allowed in Star-chamber taken in other Courts, they were rejected as a crafty device to induce Depositions against the Rule.

Hoskins

*Hoskins Cafe.*

Hoskins sued in the Ecclesiasticall Court, for all the Tithes of the ground of one Eve, who praped a Prohibition upon farmise, that the Queen was lessee of two parts of the Tithes, and had granted them to one Weston, and so conveys them to another, to whom he had paid those two parts. Now the Parson by Harris Serjeant, prayed consultation for the third part, but it was denied him; because his consultation cannot be granted but according to his libell. Wherefore he must libell for the third part de novo; Quare if he might not have a consultation as to the third part only.

Consultation according to the Libell.

*Sir Thomas Sherleys Cafe.*

Sir Thomas Sherley being under protection, was brought by Habeas Corpus to the Common Pleas barre by one, who desired to have him charged in execution, by reason of a Cap. utlagatum after judgement for his debt. But it was answered by my self, and the Court agreed it, that because the Capias utlagatum was the Kings suit, and for the Subject, but in the second degree, the King might discharge his own suit. If any Act had been done by the King to frustrate the outlawry, this were so; but a Protection will hardly doe it, especially not being uttered or made known to the Coroners. Now then the party is not in execution for the party, though he make his Election after, specially, as this case was being after the year.

Habeas Corpus Cap. utlagat.

Protection for the Kings debtor.

But it was said, that though the Kings debtors were in execution, by his body or his lands for the King, yet the Subject might also lay or take him in execution by his body. For the Statute 25 E. 3. cap. 19. (where it says the Subjects execution shall cease, till the King be satisfied) is understood of such executions, whereby the King may be prejudiced, sc. lands or goods. But the body is all in all.

*Glanville & Allens Cafe.*

Star-chamber.

In the great Cause of Glanville and Allen defendants, in the Star-chamber, at the suit of the Kings Attorney for offering Indictments in the Kings Bench upon proceedings in Chancery after judgement and some indirect dealings in that Case, they answered, but refused to answer inter: And upon motion it was resolved by the Court, that the Bill could not in this case be taken pro confesso, because it was answered and denied by the answer. And therefore it was ordered that they should be put in Trons, and so more and more clogged till they answered. Yet I then doubted, for I conceive that the answering upon Inter. was the more perfect answer, that being his own, the other as it were his Counsell. So that I counted the answer not finished till the Inter. were also answered by reason of the course of that Court.

Bill answered and Inter. refused cannot be taken pro Confesso.

*Flowers Cafe.*

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One Blanch Flower bought a title thus: that if he could recover it he should pay 200 pounds, otherwise nothing. And now he was sued in the Star-chamber for the buying, and maintenance of suits after: the buying was laid upon the Statute of 32 H. 8. and out of time, scil. after the year. So for that part he could not be questioned.

Maintenance of a title brought, but nothing to be paid without he recovered.

The maintenance the defendants Councell said was lawfull. because he had taken the state of the land, so he maintained his own cause, yet he was sentenced by that point. For it was said, that till he had recovered it was not in effect and truth his, because he was to pay nothing, if he recovered not. And it was not meant unto him to be given him freely. So all the while he maintained the title at the perill of the owner. Besides, this being a meer device, and fraud, and



Embassadour  
how he may  
deal as a Pro-  
curator or not.

The defendant demurred upon the Bill, and it was referred to my brother Nichols and my self, scil. the demurrer by my Lord Chancellor, we heard Serjeant Mountague for the Embassadour, and Serjeant Crew and Horton for the defendant, and we were of opinion, that the Embassadour was not to be answered to this Bill, for (to omit that a Procurator ought to sue in the name of his Principall,) no man can make a Procurator for me but my self; therefore the King cannot make a Procurator for all, or any of his Subjects, without their allowance; that is for the part of the plaintiffe. Again, on the part of the defendant, the Embassadour neither by release nor sentence, can discharge him against the Principall, from whom he hath no Procuracion. Again, the office of an Embassadour, doth not include a Procuracion private, but publique for the King, nor for any feberall subject, otherwise then as it concerns the King, and his publique officers to protect them, and procure their protection in forein Kingdomes, in the nature of an office, and negotiation of State; and therefore they may and ought to mediate, prosecute, and defend for them or any one of them at the Council Table, which is as it were a Court of State. But when they come to sit in Courts, which doe and must observe essentiall forms of proceedings, scil. processus legitimus, then they must be ruled by them, and not confound all Rules; except some Presidents could be found in Chancery.

But we made no report, because we advised another course, whereunto both parties consented. And we the Judges of the Common Pleas, where this cause depended by Prohibition appointed a Suit by consent in Chancery only to examine witnesses, and then we to determine the Cause, as Judges of our own Court Arbitrally, not by warrant of any order of Chancery.

And so a large Bill being founded, onely upon our order and consent of parties, we made a small order, whereof the main was, that 200 pound was to be paid to the Embassadour, he giving security of a much greater summe (because the Embassadour had made a high estimate; and indeed the goods (not alletting just defalcations of spoils, salvage and other things) was 2600 pound, or 2700 pound) to secure the defendant against all Proprietaries, and other claims. Vide supra.

Star-chamber.

Bradshaw and Salmon.

Covenant.

Breviars to Jur-  
ries.

In the Star-chamber between Bradshaw and Salmon in an Action of Covenant, the same Salmon had upon the triall, delivred Breviars to the Jury, by means whereof 200 marks damages were given against Bradshaw, for the plaintiffe, when it appeared, that there was no cause of damage in effect, but onely somewhat must be given, because the issue by not pleading the truth in form was passed against him, and though the plaintiffe in this case, had an ordinary remedy in law, by Attaint for excessive damages, yet for the difficulty of proceeding in Attaint, the Court gave him 160 pound damages here; Note that the Jury were not defendants, which yet they might have been here in respect of the Writs received. But I hold that a Bill against them onely for giving of excessive damages could not lie.

Bill cannot lie  
against a Jury  
for giving ex-  
cessive dama-  
ges.

Anonymous.  
Star-chamber  
admits no fo-  
rein depositions  
directly  
nor indirectly.

In a suit in the Star-chamber, Witnesses were examined to probe, what was deposed concerning a Will in the Ecclesiasticall Court; But because Depositions are not allowed in Star-chamber taken in other Courts, they were rejected as a crafty device to induce Depositions against the Rule.

Hoskins

*Hoskins Case.*

Hoskins sued in the Ecclesiasticall Court, for all the Tithes of the ground of one Eve, who prayed a Prohibition upon surmise, that the Queen was tithes of two parts of the Tithes, and had granted them to one Weston, and so conveyed them to another, to whom he had paid those two parts. Now the War-  
 ren by Harris Detjeant, prayed consultation for the third part, but it was denied  
 then, because his consultation cannot be granted but according to his libell.  
 Therefore he must libell for the third part de novo; Quare if he might not have  
 a consultation as to the third part only.

Consultation according to the Libell.

*Sir Thomas Sherleys Case.*

Sir Thomas Sherley being under protection, was brought by Habeas Corpus to the Common Pleas barre by one, who desired to have him charged in execution, by reason of a Cap. utlagatum after judgement for his debt. But it was answered by my self, and the Court agreed it, that because the Capias utlagatum was the Kings suit, and for the Subject, but in the second degree, the King might charge his own suit. If any Act had been done by the King to frustrate the outlawry, this were so; but a Protection will hardly doe it, especially not being uttered or made known to the Coroners. But then the party is not in execution for the party, though he make his Election after; specially, as this case was being after the year.

Habeas Corpus Cap. utlagat.

Protection for the Kings debtor.

But it was said, that though the Kings debtors were in execution, by his body or his lands for the King, yet the Subject might also lay or take him in execution by his body. For the Statute 25 E. 3. cap. 13. (where it says the Subjects execution shall cease, till the King be satisfied) is understood of such executions, whereby the King may be prejudiced, sc. lands or goods. But the body is all or all.

*Glanville & Allens Case.*

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practised by a Solicitor to transerre to himself another mans tittle to follow up-  
on a casuall match was to be met withall in time.

Quare, If this will lie upon the Statutes at the Common Law Courts.

Habeas Corp.

Wickstead versus Bradshaw.

P. 14 Jac. Rot. 2178.

Baile cannot  
render the bo-  
dy of the de-  
fendant in the  
Common  
Pleas after  
writ of Error  
brought by  
him.

**W**ickstead recovered against Bradshaw 60 pounds debt and 46 shillings  
8 pence damages, and now this Term Bradshaw was brought to the  
Barre by a Habeas Corpus procured by his bail, with purpose to save themselves.  
And so both the plaintife prayed that he might be committed in execution, and  
also the bail that he might be received in their discharge. But it appeared to the  
Court that Bradshaw had already bought a Writ of Error which was allowed  
by me, and the return of it not yet come; so that the Court was disabled either to  
award execution or to put him in execution. And this also was the cause that  
the baile could not be discharged, for the end of the bail is not only to bring the  
body, but that he come subject to the Court according to the meaning of the bail,  
which cannot be in this case because of the Writ of Error, for the entry in dis-  
charge of the bail must be, that the defendant reddidit se to the Court to be in  
execution if the plaintife will, which cannot be so here. And Quare whether this  
bath not so disabled this defendant by his own act, that the bail is disabled (note  
the bail have not disabled themselves) though afterwards he procured not in his  
Writ of Error. And so execution may be taken here.

But note that afterwards this Term Bradshaw the defendant was brought  
again to the Barre by another Habeas Corpus, and the plaintife prayed him in  
execution, which was granted because the day of the return of the Writ of Error  
was passed, and he had not caused the record to be removed, and therefore this  
Court was re-enabled to award execution.

Obligation,  
London.

Walter versus Piggot.

Tr. 44 Eliz. Rot. 1031.

Septuagint for  
septingent.

**W**illiam Walter brought an Action of debt against Thomas Piggot and de-  
clared that the defendant stood bound to him in septingent & quin-  
quagint' libris, and produced his writing, obligatoe upon oyer, whereof the  
two words were septuagint' & quinquagint' libris: Whereupon the defendant pleaded  
the variance, and thereupon a demurrer, and adjudged for the plaintife that it  
was no cause to abate the Writ. And the defendant put to further answer, who  
pleaded non est factum. And the Jury found that the aforesaid writing obligatoe  
de summa septuagint' & quinquagintarum librarum, per quod predictus Willi-  
elmus Walter per bre. suum de elegit prafar' Tho. Piggot infra script. septingent.  
& quinquagintas libras was sealed, and delivered by Piggot to Walter as his debt;  
sed utrum super tota materia, &c. And thereupon the Court adjudged the plain-  
tife should recover the 750 pounds demanded, and damages and costs. Note there  
was nothing either pleaded by the party, found by the Jury, that it was meant  
for 700 pound, upon this judgement a Writ of Error was brought, but it ap-  
pears not what was done upon it.

Blackford versus Alkin.

Tr. 14 Jac. Rot. 2376.

Trespasse.

**T**homas Blackford brought an Action of trespasse against John Alkin for se-  
izing his boyse. The defendant pleaded that one John Holt was seised in  
fee, and so seised, granted a rent of 4 pound per annum to John Alkin with  
clause of distress, and conveys the rent to the defendant, and for 40 shillings he  
distrainted.

The plaintife replied that long before the grant supposed William Holt was seised



and had issue John Holt the elder, and John Holt the younger, that he  
willed his land to his said two sons in tail and died. That John the eldest died  
without issue, and that John the younger had issue A & died, and that A gave license  
to the plaintiff to put in his house, absque hoc quod prae. Johannes Holt pater  
suis feodis in dominico suo ut de feodo, prout. sur que, issue, and found for the  
plaintiff. And it was said in arrest of judgement that there was no issue, for it  
was not pleaded that John Holt pater was seised in fee as the traverse was. But  
judgement was given for the plaintiff, for though pater be added, yet prae  
Johannes Holt prout the defendant had alleged, binds it to that person that the  
plaintiff had pleaded, and that pater is but John, and can doe no hurt, especially  
if it may stand true that he was pater, as if it had been traversed absque hoc  
quod prae Johannes Holt generosus, &c. otherwise if it had been absque hoc quod  
prae Willielmus Holt, which could not be taken for the same person, yet perhaps  
it might have been amended, though hardly.

Box versus Barnaby.

Case.

On an Attourney, brought an Action upon the Case against Barnaby for these  
Words: When art a common maintainer of suits and a Champertor, and  
will have thee thither over the Barre the next Term. And after a verdict for  
the plaintiff, upon a motion in arrest of judgement, the Court gave judgement  
for the plaintiff, only upon the word Champertor, for there is maintenance labo-  
ri et non infortunio, and where the word is indifferent, it shall be taken in mitio-  
riorem partem; now an Attourney may and ought by his office to maintain his  
clients causes. And yet in an Action of maintenance he cannot plead not guilty,  
but must justify. And an Attourney may well be said a common maintainer, be-  
cause he is common to as many as will retain him. And the words of showing  
at the Barre, are utterly of an uncertain sense; But indeed it is a slander to  
an Attourney, and that in his vocation of Attourney to be a Champertor, for  
it is not only beyond but against his office. And therefore 20 07 21 H. 1. Rastal.  
In Champerty 3. That pleaders and Attournes take plea to Champerty. And  
hold that if an Attourney follows a cause to be paid in gross, when it is reco-  
vered, that is Champerty.

Attourney cal-  
led a Cham-  
pertor.

But when it was objected that the word [Champertor] was a word of Art  
not to be understood by the vulgar, and so no damagable slander, no more than  
to be a Latine, or Welsh, except you say that the hearers understood it, it was  
advised that this being English, and of a certain and single sense, the Court can-  
not doubt but it was understood.

Napper versus Jasper & George.

Tr. 14 Jac.

An Action of trespass brought by Robert Napper against Charles Jasper  
and Robert George, issue was taken, that Richard Johnson Prebendary of the  
Prebend of Preston in the Church of Sarum, and all his Predecessors Prebenda-  
ries, &c. had used time out of minde to keep a Sheppard of certain Sheep of theirs,  
allowing the same Sheep for the better keeping of them, feeding together in a  
certain pasture, from the Sheep of Thomas Earl of Suffolk in the same place, and  
the issue was found accordingly. And it was moved that this was a void verdict,  
for the prescription was senseless and could not stand, that the Sheep could be kept  
time out of minde from the Sheep of the Earl of Suffolk, being but one mans life.  
But yet judgement was given according to the verdict for the plaintiff, for the  
substance of the issue was the keeping of the Sheep of the Prebendary feeding to-  
gether, and the other part was but a consequent of it, that thereby they were  
kept from the Sheep of the Earl.

Verdict seem-  
ing against  
Law and sense.

Brickhead

Q Imped.

## Brickhead versus Bishop of York and Coke.

V. case.

Amending of  
an originall.

**I**n a Quare Impedit, between Brickhead plaintiffe, and the Archbishop of York and Coke defendant for the Vicarage of Leeds. After demurrer joyned and one or two arguments at the Barre, it was found in the Writ in Head of Vicariam Vaccariam. And so it was prayed to be amended, whereupon the Curstis was called into the Court. And because it appeared to the Court by his book, that his instructions were Vicariam, and he depoled that the tiffing was delivered unto him accordingly, he was ordered to amend the Writ in open Court, and so did.

Prohibition.

## Shelton versus Montague.

Hil. 13 Jac. Rot. 2072.

Prescription  
for a Modus  
Decimandi  
which is in  
Occupiers.

**W**illiam Shelton Esquire brought a Prohibition against Richard Montague, and declared that where he holds and occupies, and by ten years last past, held and occupied 100 acres of land, and 10 acres of wood, lying within the bounds of the Parish of Stamford Rivers in Essex within a Park there called Ougar Park, being part of the said Park which extends it self as well into the Parish of Ugar as Stamford Rivers. And whereas the said William and all the occupiers of that part of the same Park that lies in Stamford Rivers, time out of minde, have payed and used to pay to the Parson of Stamford Rivers aforesaid, &c. yearly, &c. four pound in full satisfaction and discharge of all the tithes of the said grounds, which four pound the Parsons had so accepted, whereupon issue was taken and found for the plaintiffe. And now Montague moved in arrest of judgement for two causes: first, because it was not laid that it was Partus antiquus to bear prescription as the case of Hebruers Park. 6 E. 6. Dic. which was answered, that there the prescription was made for the keeper which requires a Park and liberty. But here the Park was laid but as land generally. The second exception was, that the prescription was laid in Occupiers, and not in Owners nor by way of custome in the place, which was resolved and answered by the Court, that this was no matter of interest and inheritance, but in point of discharge, and therefore the Presidents were very common in this kinde, and so 15. 16. and 18 E. 4. Inhabitants may prescribe for an easement. And I said that the prescription in this case did not so properly lie on the part of the Parson, for no man can prescribe to his own charge, onely as to pay four pound per annum, but it took effect rather on the part of the Parson that received it.

But the prescription indeed amounts to this, that the Occupiers or parishioners have been time out of minde discharged of all tithes by payment of four pound per annum, for every Modus Decimandi is a discharge of the naturall tithe, and so works by way of discharge, as it is resolved in the Parson of Pyekins case, Dyer.

Q Imped.

## Dominus Rex against John Bishop of Rochester, and Jackson his Clerike.

**A** Quare Impedit was brought by the King against John Bishop of Rochester, and Edm. Jackson his Clerk, and declared that Queen Eliz. was seised of the advowson of the Church of Milton by Gravesend in grosse, and presented one Soan, who at her Presentation was, &c. and now the Church is void by the death of Soan, and it appertains to the King to present. The Bishop and his Clerk plead that before the Queen, &c. Edm. Bishop of Rochester was seised of the said advowson, and collated one John Jackson, and then was removed to Norwich, and then in the vacation Jackson died, and the Queen presented Soan; And now Soan being dead it belongs to the now Bishop, &c. who collated the said

Edmond

Edmond Jackson, who is Parsona impersonata, &c. absque hoc that the Queen was seised of the Abbotsdon, prout: and the Jury found that the Abbotsdon in the third turn. And that the Queens first turn was satisfied by the presentment of Soan; and that this is the second for the King, and concluded. Si super materia, the Court doth judge that the Queen was seised of the Abbotsdon, ut de uno grosso per se ut de secundo & jure. Then the Jury found so, but then contrary. And though this verdict did not finde the issue for the King, yet the issue was to be understood of the whole abbotsdon, yet because it did clearely appear to the Court by the verdict, and that not out of the issue, that this presentment did of right belong to the King, therefore the Court did award a writ to the Bishop for the King, and to remove the Clerk of the Bishop, and to this the Bishop assented, which was so entered in the record of the judgement.

Parry versus Dale.

Obligation.

Pasc. 4 Jac. Rot. 531.

Ches. London.

Thomas Parry brought an Action of debt against William Dale for 500 pound upon an obligation dated the 16 of September, Ann. 41 Eliz. Dale the defendant demands Oyer of the Obligation, and it was read in these words, Noverit universi per presentes nos Richardum Oldsworth & Willielmum Dale cives & Groceros London, teneri & firmiter obligari Tho. Parry generoso in quinquecentis libris legalis monetæ Angliæ solvend. and the defendant after Oyer of the obligation pleaded an insufficient barre, whereupon Parry demurred, and yet was nought, because quinquecentis was no Latine word at all. But the causes coming by writ of Error before the judgement in the Exchequer Chamber, after many debates and presidents seen and perused Ter. Pasc. 14 Jac. the case was ended by mediation of the Judges, and 300 pound given by order to Parry, and so generall releases from each to other. For my self and most of the Judges were of opinion, that the bond was good for 500 l. but the chief Baron being one of them that gave the judgement in the Kings Bench.

Obligation false latine or no latine in the summes.

Wood versus Budden.

Trespasse.

Pasc. 14 Jac.

Wood brought an action of trespasse against Budden and declared in the new assignment in a close of pasture in Tollard Royall; the defendant pleaded that William Earl of Salisbury was seised as in fee and right of an ancient chase replenished with Deere called Cranborn, and so prescribed in liberty of Chase, and that the same Chase did extend it self as well in and through the 8 acres of pasture, as in and through the said Town of Tollard Royall, and justifies the trespasse for use of the Chase. The plaintiffe maintaines his declaration, and traverseth that the Chase doth not extend it self as well to the 8 acres as to the whole Town. And this issue was tried at the Barre and found for the plaintiffe. And now it was said in arrest of judgement by Finch Serjeant, that this issue and verdict were faulty, because if the chase did extend to the 8 acres onely, it was enough for the defendant, and therefore the finding of the Jury that it did not extend as well to the whole town as to the 8 acres did not conclude against the defendants right in the 8 acres, which was onely in question. But it was answered by the Court that there was no fault in the issue, much less in the verdict (which was according to the issue;) but the fault was in the defendants plea that now takes the exception, for he puts in his plea more then is needed, scil. the whole Town, which being to his own disadvantage, and to the advantage of the plaintiffe there was no reason for him to demurre upon it, but rather to admit it as he did, and so to put it in issue, And so judgement was given for the plaintiffe.

Verdict upon issue larger then is needfull.

Smales



Smales vers. Dale. Ejectione.  
Tr. 12 Jac. Rot. 2147.Entry by one  
tenant in Com-  
mon serves for  
all.

John Smales brought an Ejectione sine assensu against William Dale of the death of John Berryman, and upon not guilty the Jurors found that one William Watson was seised of the land in question and had issue Allen Watson and Anne Watson by one wife, and William Watson by another, and that the said William Watson was knighted in the service of the late Queen, and that his wife entered in the land to all the lands; and that Allen made no actual entry into the lands, but died without issue, and then the wife married, and William Watson the younger son entered and infeoffed the defendant, upon whom the plaintiffes (sister) being son and heir of Anne the sister of Allen entered, and made the lease to the plaintiff, who being actually ejected, brought his Ejectione Firme of the whole land, and it was adjudged for the plaintiffe, as to the third part onely which descended to Allen notwithstanding the demise, for it was resolved, that the wife's actual Entry did work to an actual Entry; also to Allen the heirs for his third part, whereof he was Tenant in Common with her. For it was said that the Entry of one Tenant in Common might be in three manners, either in the name of her self, or her fellows (which were most clear) or generally (as this case is,) which shall be always taken according to right as being under construction of Law, and therefore ever construed lawfull; or lastly Entry claiming all expressly which yet cannot dispossesse her fellows, for her possession is over all lawfull, as well before such claim as after, so that there is no possession altered, by such claim; and then a sole claim, without more can never change the possession, and without a change of possession it remains as before. And therefore a Copartner a jointenant, or tenant in Common can never be disseised by his fellows, but by an actual Ouster; and therefore in such a case if a Tenant in Common, bring an Action of trespass against a stranger alone, his action shall be barred, by pleading him Tenant in Common with another, howsoever his Entry was made, which proves that the Entry of one serves for all, for else they could not joyn in an Action of Trespass.

Star-chamber.

Lord Darcy of the North against Gervase Markham.

Star-chamber  
punisheth pro-  
vocation to a  
Challenge.

The Lord Darcy of the North sued Gervase Markham Esquire in the Star-chamber, and the case fell out to be thus, That they had hunted together, and the defendant, and a servant of the plaintiffes, one Beckwith fell together by the Cars in the Field, and Beckwith threw him down and was upon him cuffing of him, and the Lord Darcy took him off and reproved his servant, and yet Markham chid him, charging him with maintaining his man. And the Lord Darcy replied, that he had used him kindly, for if he had not rescued him from his man, he had beaten him to ragges. Whereupon Markham wrote five or six letters to the Lord Darcy, and subscribed them with his name, but sent them not, but dispersed them unsealed in the Fields, whereof the effect was, that whereas the Lord Darcy had said, that but for him his man Beckwith had beat him to rags, he lied, and as often as he should speak it he lied, and that he would maintain with his life; and then said that he had dispersed those letters, that he might see them of some body else might bring them to him, and concluded, that if he were desirous to speak with him, that he should send his boy, and he should be well used. This Cause was effectually handled at the Common Law, not engaged by the Kings Proclamation, because the defendant had no knowledge of the Proclamation, nor by likelihood could have it was so soon after the Proclamation; but the Plaintiffes Counsell by direction of the Court, left the Proclamation, and yet Markham was censured and fined 500 pound, the reason of the sentence was, that this was a compounded misdemeanour, for the letter thus dispersed, was

in the nature of a libel slanderous and defamatory to my Lord Darcy, and the other point was that though there were no direct Challenge to my Lord Darcy in fight, yet there were plain provocations to it, and as it were; so call and challenge my Lord Darcy to challenge him. And though the Case was somewhat aggravated, that it was so a Years of the Reine, yet the censuring of the Fact, rose out of the nature of it, and not out of all the Circumstances of the person. And by my sentence said, that the law did not allow any man to strike in private revenge of his words. And the reason of the wisdom of the law in that way, because there was no proportion between words and blows, and he that is stricken may strike again; But it is true, that there is a judgment allotted before the Constable, if a man be called Traytor, and in such case for matter of satisfaction in point of Honor, (as it is called) that was left to the Lord Sparhall, as a distinct Court and consideration from this. In this case in my sentence, I sayd that those insolent persons take upon them to assume a late and Common-wealth to themselves, as if they had power to set off the yoke of obedience to peace and Justice. And therefore they enact among themselves as an undoubted position, that a man wronged may with his sword in his hand, require satisfaction of any man, being no private Cause, follow; and with a mild word, to qualify the detestation of this kind of murder, they have made it a familiar phrase, that he was killed fairly, and hee was killed in equall fight; which arrogance and Rebellion must be subdued by the Court, censuring the best. And by Judges and Jurors, who must not give my way to this impious distinction of faire and foule killing, but must punish the law, with severity upon all murderers, for the law knowes no such distinction: as thus &c.

And this I noted publickly to doe, for I took it to be the onely remedy  
against this damnable presumption, as yet I found it not of strength of con-  
science to bring; it pleased the King much to approve, and it pleased  
himself that I shd hit the true mark in it. This was the last day of December  
1615, when it pleased him to conferre with his poore servant of others things.

## Searles' Case.

**O**ne Seavle Parson of Essex, was tried before me and found guilty of manslaughter; whereupon (Doctor Donne, master of the Requests, being his Patron) he was questioned to depuration, before Doctor Bird Judge of the Admiralty to the Lord Archbishop, where he desired to be admitted to his defence; that he was not guilty, contrary to the verdict: And Doctor Bird came to me for my direction. And I (though I doubted not yet) conferred, and we agreed, that Felony or other Capitall Crimes, were not examinable in the Ecclesiasticall Courts, no not for purposes that were examinable there, as is this case of depuration; And therefore they may not Originally examine such a Crime to probe a man Criminosus, much less when it is proved in the proper Court impeach the Sentence in a Court improper. But they may build a Sentence of Depuration upon such a conviction; and they are bound by it. And it is dangerous for a Judge Ecclesiasticall to come against it.

**Simon Pitts versus Richard James et alios.**  
Tr: 12 Jac. Rot. 2187.

Simon Ples gent. brought an *Ejectione firme* against Richard James gent. Walter Webber and Edward Bley of a meadowe and others lands thereunto belonging in Yettley in the late County of Oxford demised unto him by Philip Ples gent. To which the defendants pleaded not guilty. And the Jury found that one Sir Richard Abbotbury Knight was seised of the Manor of Donnington in the County of Berks and of the manor of Yettley in the County of Oxford.

Oxon.  
Ejectione firme.  
Brownlow.

Case adjudged  
upon the statute  
of Chantries.  
In which was  
also a great  
point, touch-  
ing misnomer  
of corporations.

(to hereof the lands in question are part) And in the 1<sup>st</sup> year of King Ric.  
had a purpose to found an Hospitall at his manors of Donnington for certain  
poore persons to serve God, & principally to pray for the Soules of King Richard,  
and himselfe while they lived, and after; And for the Soules of the Kings  
Progenitors and heires; and his owne Successors and heires forever according  
to such Ordinances as he should make. And to maintain the same he gave

Then they find that the King taking knowledge of his good purpose, &  
further the same, and to make himselfe partaker of the benefit thereof, and give  
him Licence by his Letters Patents to found the Hospitall at his manor of  
Donnington for certain poore, whereof one should be a Priest, and should  
be called Minister Dei, pauperis domus de Donnington; and that the Knight give  
to the Spinster and poore, and their Successors, two Acres of his manor of  
Donnington for their habitation, and the manor of Yestley for their sustentance,  
on, to serve God, and especially to pray for the Soules as *supra* according to  
Ordinances as *supra*. Then they find that Abberbury did erect the house and  
place poore according to his purpose and the Kings Licence. Then they  
find that he by his deed 17 R. 2. reciting that he had founded the Hospitall  
of certain poore to pray for the Soules as *supra*; appoints Walter Clerk,  
to be abode the rest, and he and his Successors to be called Minister Dei,  
pauperis domus de Donnington, and then gives *dist. Walter*, & *pauperibus* *dist.*  
*fratribus suis* the two Acres and the manor of Yestley, *habendum illis Walter*,  
*Ministro* & *pauperibus confratribus suis*, & *eorum successoribus imperpetuum*,  
and no mention there of prayers. And to hold illi et eorum *dist.* of your grace

Then he makes his Ordinances; with this: *illis (inter alia) Ita salubri*  
*statu* of the King and himselfe, during life, and after for the Soules as *supra*.  
And there is one Ordinance amongst the rest, that the poore shall every  
day goe to Masse, to a Chappell of Fryers neere adjoining, and shall be 30  
Water Posters, and as many Ave Maries. Then they find that (after many  
others) one Thomas Letherland was made Spinster there, and that he and his  
Confreys, by the name of Thomas Letherland peccan, Spinster of the Almes-  
house of God, of Donnington, besides Newberry in the County of Berks, and the  
Almesmen Confreys of the same house, did demise unto David Lewes Doctor  
of Law, the manor of Yestley (whereof the land in question is part) for the  
terme of 80 yeares, which lease was made in 8 Eliz. and that lease he gave  
Conveyances is brought downe to Philip Pitts who made the lease to the  
plaintiffe as *supra* entring upon Richard James who was in possession, and  
Richard James and the other defendants reentred. And so concluded upon guiltie  
or not guiltie. And judgement upon this case was given for the defendants,  
that the plaintiffe should be barred because he had no Title, and therefore  
could not justifie to enter upon Richard James; And so the case was decided.

This case was divided into two great points. The first whether this were not an Hospitall dissolved and given to the King,  
by the Stat. of 1 E. 6. of Chantries.

The second, whether the lease made by Letherland (under which the plain-  
tiffe claimes) were made according to the Name of Incorporation or not.

1 Great point,

As to the first point, Warburton, Winch, and my selfe (Mr. Nichols was  
dead) were all of cleare opinion that it was a Superstitious Hospitall, and  
so given to the Crowne, and so the plaintiffe could have no title. And there-  
fore we held clearely that though the word (Hospitall) was not in the Stat. of  
1 E. 6. as it was in the law of 37 H. 8; yet that was not materiall; for the  
life of the law, which is the meaning, did not upon the Statute 37 H. 8. reach  
unto Hospitalls erected merely for poore, without Superstition, though the word  
were there; and this law without the word reacheth to them being Supersti-  
tious. And therefore where all manner of Colleges are given, yet the Colleges of  
the University are not given, but Superstitious only; (under which word,  
this being a Collegiate house Superstitious is well and literally taken) And  
yet where a Law is made beneficiall for good Colleges, it shall be expounded in  
their



[illegible]

part I hold clearely, that Parochiall Priests were not within the Law, though they were within the woods. 2) And therefore first: if a man had sold his Poperie given land to a Parochiall Priest for his better maintenance, or his function and saying of Divine Service, this had not been within the Law, though the ordinary service were at that time Superstitious. For the small of his function was not so; Superstitious, but so; Gods service, which stands by publique Authority: but grate to abbeis after. But if a man had sold to a Parish Priest to pray, or say Masse for his Soule, this is within the Law, as it is held 26 Eliz. Dier. 337. for to this purpose he is a Soule but not a Parochiall. The same I hold of all Chappels of ease created merely as members of the Parochiall Church, and for that publique use, as they had been out of the Law though there had been no prohibi. for them, otherwise it would be if they had been created so; Abbeis at the first. The same I hold of Cathedrall Churches though they had not been named. continued to the next page

But the Statute gives unto the King Chanceries in them, so the State will not send to Churches as Colledges.

he held this Hospitall to be twiſt the Law, in the firſt and ſecond  
ſurges, as a Superſtitious collegiate body legally corporated, and therefore  
what point ſtronger then the caſe of the collegiate Church of Lanway Brevy  
ſcilz. Dier 267. which was but a pretended Corporation: And it was obſer-  
ved that this ſtatute did meane to extend to lay Corporations and Companies  
as well as ſpirituell; for it hath one claufe of plains gift of all guilds &c. ex-  
cept of Crafts and Myſteries. Again it gives all profits payable by Corpo-  
rations of Myſteries. And a third claufe that it ſhould not be prejudiciall to gene-  
ral Corporations of Cities or Townes.

And though it was said - there was never judgement given of a lay person for reliefe of poore, it was answered that this Hospital was not so much made for the reliefe of the poore, as for prayer for Soules, as appears in all parts of the case; that the poore were but cheape hirelings to praye for. And so was the small cause which is *Causa tantumum* whereof it is truly said.

Timmodique est id quod est principalis in ipso: and, intentionem nomen imponit  
per meo. So this indeed was a Superstitious Contenticle, for it is truly  
in Adams case, fol. 112. that prayer for Soules was the generall matter  
of all Obits, Anniversaries, and the like, which were but severall formes of  
prayer for Soules. And even in Adams case in Barrons will the land is given  
to his friends, and one use appointed for six poore folkes: but (but because, it  
was to pray for Soules) it was adjudged within the Law, which is in effect  
to reason a judgement against Lay-hospitalities; for poore ordained so to pray  
for Soules; for it is one in reason, whether the poore ordained so to pray be  
aggregate in one body, or divided as severall persons, as they were there, and  
in many other cases cited in that case, if their maintenance end in prayer for  
Soules. And where it was objected that in this case the prayer for Soules was  
not directed to ordinances, and there was no such ordinance made, it was answered  
the wayes. First if there were no ordinance to that end, then part were  
lost, and so they were bound by the generall purpose and end of their instituti-  
on, expressed in all parts of the verbit, to pray at home and in private, as  
Littleton Chap. Frankmoigne, The tenant is bound to say Masse, and pray

Bendlose his  
case of a gift  
to pray for  
Soules so long  
as the lawes of  
the Realme  
should permit,  
was judged out  
of this Law.

60; the souls of the founder: yet there is no such thing expressed in the charter but to hold in Frankalmoine, but the reason of the gift and intent of the giver shewes up the rest.

Next, the ordinance for bearing and attending spalls: as, how chargeable  
ordinance for that purpose; for spalls were holden propitiatory for the quick  
and dead. And therefore though in this case the Fryers Chappell, and the  
spalls there were not instituted for Abberbury, yet the poore attending  
might and ought by their order to apply these generalls to the Soules for which  
they are bound to pray, even as any Christian applies the generall prayer of  
the Church to his owne Soules health.

Now if the whole Hospital had not been given to the King, yet the death of  
Wills, Annaberkis, by the death (& other like intent and purpose) done,  
it would have given the lands to the King, because the whole was given to; but  
purpose, *sci.* for prayer; for Soules; and stronger then the case cited in Adam  
case where such gifts were but in part, but uncertaine, so as the King must  
give all, else he could have nothing.

But this clause (as I observed) could give the King nothing, because the  
verses contain no employment within 5 years, which upon that clause was  
necessary, but not upon the other, which gave the very College a Right  
it sells to the King, and so the King is bound to give it to the College.

But in general our caption must be observed, that the Superstition was  
be plaine, and not imaginary, and therefore in Porters case the bill made pro-  
vision for the maintenance of Beadsmen. Now though the paying by tithe  
on of numbers, and Beades, was a superstitious vanity, yet because the trade  
of Beadsmen was grown into a common acception for poore people pay-  
ing for their Benefactors, it was not presumed to be for the souldes of the dead  
(though it were commonly so used) and so was judged no Superstitious ex-  
penditure.

2 Great point.

Now in the second great point I observe that the true name was not found in a direct clause according to the moderne and exact forme, but it is only made by Collection; the Plaintiff being named by himselfe exactly in the Plea Licence, but the poore are not there joyned in the name, but afterwards in the grant of the land Aberbury, and so more fully and directly to be gathered out of comenion of the clauses, then in Doctor Byrnes case. Now then to the Plaintiff, there was addition in these words (besides Newbery in the County of Berke) which was not regarded though it were not found by the verdict to be so, said, because it shall be presumed true as in Harpers case Coke lib. 11. 24. If a man covenant to stand seised to the use of I. S. his Colln, he need not to shew that he was his Colln, and yet it is necessary, but it must come on the other side: And this is but a surplussage to make the name a little more certain which be soe was full and perfect of it selfe. But you must not so follow the truth of the present, that you lose the knowne name and notion which is the cleare minimation, as was in the case of Hale and Wingate, where Windfor College being founded by Ed. 4. by the name of the Deane and Canons of the Kings free Chappell of Windfor, the lease was made in King Philips time, by the name of the King and Queenes free Chappell, soe this was a variance in the very body and substance of the name (not in an excellence) though it was in some sort true.

Point touching the words [bryðren] for confederates, [Almeshouse and Almesmen] for poor's house and poor's men, [bryðren of the house] for brethren of the splinter, these differences were not regarded.

So in conclusion the great objection was, that whereas the true name was *Minister dei pauperis domus*, it was made *Minister pauperis domus dei* in the Lens, which was said to be an Inversion not only of words and order, but also of sense and matter.

For whereas the institution was that the spinster prefix cateris verbis made a servant to the house, cleane contrary. And of this opinion Justice

Warburton was: But my brother Winch and I were plainly contrary, where-  
 as I gave this reason, that Minister doth not alwaies import an inferior to  
 him, to whom he doth minister: for the Psalm saith, God hath made man  
*inferiorem Angelis*. And yet in the first chapter to the Hebrewes, it is said  
 that the Angels are ministering spirits, sent forth for the good of Gods Saints,  
 and the Pope in imitation of the truth calls himself *Servus Servorum Dei*.  
 It is true that Governors both civil and Ecclesiasticall serve the people:  
 and therefore Saint Bernard saith well, *Prælati non tam student præstare quam*  
*servare*. And our Saviour Mar. 23. 11. He that is greatest among you let him  
 be your servant.

Now touching this name to prove that as it hath all the words in number,  
 and motion, so in effect and matter observe, that the word Minister is *nomen*  
*multiplex, ambiguum, relativum*; And therefore Dei is added for  
 distinction.

So now you have Minister for servant, and God for his Lord and Master.  
 But yet you have not his employment and service; for though all good men be  
 Gods servants, in their generall vocation, yet they cannot be called the  
 ministers of God but to a more speciall use: And that *ministerium* is understood  
 of the Clergy, but that fits not this case, for he is by institution Lay.  
 Therefore you must yet find his other service, which follows that he is the  
 minister of God of his poore house at Donnington: that is as much as to say,  
 Minister of God for or about the poore house *et. ci.* in that service, so Gods  
 service in this name is the service of Gods house; and therefore they are com-  
 mitable; And who sees not that whosoever ministers to the poore, ministers  
 to God, as it appears in that Solemn sentence of the last day. In as much as  
 ye have clothed, clothed the poore; ye did it unto me.

The hardest cases that were ever adjudged upon those Epinomers have been  
 upon omissions or additions; As Fisher and Boys case, for omission of the  
 word *Scholars* in a second part of the name, which I should hardly have  
 seen, for since they were named the Scholars of the house in one part of the  
 name, it must follow that it was the house of the same Scholars (which was  
 that named,) as Burgeses of Lynne, implied that Lynne was a Borough.  
 And Paschall and Fanshawes case of the Savoy, or called the Savoy, was a  
 judgement, for things shall be supposed to be named according to truth;  
 and therefore in the case of Lynne, the meaning of Lynne Regis was adjudged  
 to import that it was called Kings Lynne. And indeed upon that judgement a  
 Mist of Error was brought and compounded, and therefore it is no very  
 true Authority.

And this case is made more full by the verdict which finds that the true  
 owner and brethren did make the Lease by the name *propt.* which cautions  
 us of finding to be commended in the case of Lynne.

And so I conclude this point with two excellent Latins Divine and Humane;  
*Ita thus; Existunt sane Injuria calumnia quiddam & nimis callide sed malitiosa*  
*ininterpretatione, ex quo illud, summum seu summa Injuria.*

And Ecclesiasticus chap. 19. speaks of this elegantly, thus:

There is a certaine subtilty that is fine, but it is unrighteous, and there is  
 but inwardly the open and manifest Law, yet there is also that is false and  
 unjust righteously. So he makes; degrees: some impudent to give false judge-  
 ment grossly; Some others as wicked yet doe it more cunningly under pre-  
 tence of strains of Law. But a man may be as false and fine to Justice as  
 any other to fraud; And so I commend the Judge that seames fine and in-  
 justice, so it tend to right and equity, and namely that in these cases of Cap-  
 tivity Epinomers doth moid the small disorders of the name to make good  
 the contract and bargain. And I condemn them that either out of pleasure to  
 win a subtilty will will destroy, or out of incensurable or negligence will not  
 labour to support the act of the party, by the act or act of the Law.



Slater vers. Franks.]

Tr. 14. Jac. Rot. 1953.

Parole Maine-  
fworne.Note that  
though the  
word be not  
understood in  
all places, yet it  
is English, and  
therefore needs  
not the averment  
as Welsh  
doth.

Slater brought an action of the case against Franks for saying, *Thou art a maine-fworne Lad, and a bankrupt Lad.* And after a verdict, it was said that these words bare no action, for it was not averred in the Declaration that he was a merchant; for the word Bankrupt was of no force, which was confessed, and so it stood upon the word *maine-fworne*: against which it was said, that it was an unknown word in these parts, and of an uncertain sense, though in the North parts it was understood to be as much as perjured, as *foi-fworne* with his hand upon the book. Now it was not averred that it was spoken in the presence of such as understood the word, nor that the word imported perjured. And yet we gave judgement for the Plaintiffs. And another like judgement we gave this Terme upon the same word. And the very like judgement was given Hil. 14. Jac. Rot. 1783.

Verdict and no  
issue.

And Hil. 1. Jac. Rot. 1372. Small brought an Action against Bell and his wife, because the wife called him a *maine-fworne* thiefe, and the Defendants pleaded not guilty and found for the Plaintiffs. But there he could have no judgement because the Defendants should have pleaded that the wife only was not guilty, so there was no issue in effect joyned.

*Action for Welsh words.*

IN the Exchequer an action of the Case was brought by *John Jones* against *John Doe* for calling him *Idoner* in the Welsh tongue, and did aver that it was in the presence of others that understood the Welsh tongue, but did not aver what the word did import, and yet judgement was given for the Plaintiffs, and the Court took information by Welshmen, what the word meant in English, wherein they were satisfied that it was as much as perjured in English.

And the like judgement in the Common pleas, and upon the like forme of declaration, were found upon search in the Common pleas between *Gilliam Verch, Howell*, against *Evan George*, for a slander in Welsh words, Tr. 43. Eliz. 3014. and another Pasche 44, Eliz. Rot. 834. And at this time Serjeant *John Moore* informed the Court, that judgement had been given in the Kings Bench, 6, Jac. in the Case of one *Tuck* upon these words, *Thou art an healer of felons*, without any averment how the words were taken, because the Court was informed, and took knowledge, that in some Countreies, it was taken for a smotherer or coverer of felons.

Q. Imped.

Chancellor, &c. of Cambridge Versus Walgrave.  
Mich. 14 Jac. Rot. 647.

The Patron of  
an Advowson a  
Popish Recu-  
sant.

SIR Edward Walgrave Knight, Henry Yaxley Esquire, and William Moore, and others were sued in a Quare Imped. by the Chancellor, Master and Scholars of Cambridge, and they claimed the presentation of the Church of Colney by the Stat. of 3. Jac. because that Yaxley being Patron of the Church, at the time of the avoidance, by the death of Johnson last Incumbent, was then also a Popish Recusant convict. To this all the defendants pleaded, but the material Plea was Walgraves, which was thus (the others resting upon the same title) He did confess that Yaxley was seised of the Mannor of East Hall ad quod, &c. in his Demesne as of fee, and that he was a Popish Recusant, but he said that for non payment of 20. pound a moneth, by commission sent forth, and inquisition taken, it was found before the Commissioners that the same Yaxley was seised at the time of his conviction of the said manor, ad quod, &c. and thereupon the said Commissioners, by vertue of their Commission, did seise two parts of the said manor into the Kings hands, and that the King did by his letters Pa-  
tents

under the Seale of the Exchequer, demit unto the said Walgrave, the said  
 parts of the Spannoz with the appurtenances, and all profits, commodities,  
 and hereditaments to the same belonging for 21. yeares, si tam diu, &c. And  
 then betwix that the Church became hold (as before) (Yaxley still remaining a  
 Defendant) by reason whereof the presentor Moore his Clerk,  
 Defendant, who had been a priest, since Yaxley was Patron of the  
 Church, at the time of the aforesaid, as the Plaintiff has declared, upon  
 which the Court considered, that the title to the aforesaid was  
 to be in the King, for the said King was the possessor of all the Rectories bel-  
 onging to that church, that he had written in the Inquisition, and before  
 the Court, that he was the possessor of the aforesaid, and that he was  
 the possessor of the Spannoz, and then the King will present alone, and the next point  
 is that there are no words in the Kings grant to Walgrave, to carry the Advou-  
 son from the King, yet because this served only to prove the Kings title against  
 the Defendant, the Court would not award a writ to the Bishop, for the King  
 being no party to the Action, except his title were clear, and without doubt  
 upon all the parties to the action, according to the Books: Whereupon (as in  
 the said is written) the Plaintiff were demanded by the Court, if they had  
 any thing to say, why a writ to the Bishop, should not be judged to be directed  
 by the King upon his title, appearing on the Defendants Plea, who did say,  
 that such a writ ought to be directed, and that they had no title to this pre-  
 sentation, notwithstanding, their title in their declaration by their made, which  
 they doe wholly disclaime. Whereupon judgement was given for the King,  
 that he should have a writ to the Bishop, that notwithstanding the Reclamation  
 of the Defendants, he should remove Moore the Incumbent, and should admit  
 Moorem personam ad presentationem Dom. Regis.

**Scaife Ver. Nelson.**

Mich. 12. Jac. Rot. 1106.

Same brought an Action of the Case, against Nelson and his wife, for com-  
 mon wrong spoken by the wife. And had judgement &c. pre. In remitt  
 &c. were both ought to be Amended, and upon a writ of Error, the Re-  
 mitter certified into the Kings Bench, and yet by order of the Court, here it  
 was amended, because upon view of the book of judgements of Goldsborough  
 is Dictionary, it appeared they well entered and directed.

Amendment  
 of a Judge-  
 ment by the  
 booke of  
 Judgements.

**Sir Henry Warner ver. Wainsford.**

Tr. 13 Jac. Rot. 1906.

SIR Henry Warner brought an action of debt against Wainsford Admin-  
 strator of Kirby who pleaded that the intestate was indebted unto him, by di-  
 vers obligations, (and recites them) to the summe of 80. pound, and that goods  
 to that value, and not above came to his hands. which he demurs for, his debt,  
 and that he hath nothing ultra. The Plaintiffs demurred in law, because it is  
 mounted to the generall issue of pleaemur Administer. But the better opinion of  
 the Court was, that this was no Cause of Demurmer, for the Plea is sufficient, and  
 besides, it is some matter in law, which hath been allowed alwayes to be plea-  
 ed especially, and not left to a Jury, and the reason of pleading a generall issue,  
 is not for insufficiency of the Plea, but not to make long Records, when there  
 is no Cause, which is matter of discretion, and therefore is to be moved to  
 the Court, and not to be demurred upon.

Obligation,

Pleas amount-  
 ing to gene-  
 rall issue.

Informations  
severall at one  
day for one of-  
fence.

Ebor.

Amendment  
(illam) for il-  
lam.)

Ebor.

Inrollment wil  
serve if it be  
before the  
Justice of  
Peace of the  
Riding where  
the land lieth

Ebor.  
Brownlow.

A grant of a  
Reversion on a  
lease misrecited.

Pie verlus Coke.

Information.

Tr. 14 Jac.

Pie the Informer exhibited an information against Peter Coke Clerk, for taking of Fines. And note it was moved by Sergeant Hutton, that on this information was exhibited by another Informer, for the very same offence, and both exhibited upon one day, so there was no priority to attach the right of Action in the one more than in the other, and therefore the Court advised them to plead the truth of his Case, for it was sufficient to bar them both in as much there being no precedence of suit to attach it in either, the Court could give judgement for neither.

Oglethorp and Maud.

The Affize between Oglethorp and Maud, the writ was ad hoc, cum Recognitionem illam, which should have been illam, and it was moved to have been amended, and Harrison the Clerk was called into the Court who made Oath, that a Note by him produced in Court (which was right) was the original note, whereby the writ was made, yet because in Penningtons Affize, which the like fault in the writ, would not be amended, the Court would be advised, not to amend it.

Perkin verlus Perkin.

Ejectione

Hil. 13 Jac. Rot. 979.

Perkin brought an Ejectione firmæ against Perkin, the Defendant, pleaded a special bar, which was insufficient, the Plaintiff replies and contended the land to his lessor by bargain, and Sale acknowledged before Tempest a Justice of Peace of the West riding, and Cartwright Clerk of the Peace there, and enrolled within six moneths. And the Plea was holden insufficient, because it did not appear, that the land in question, which was contended, did lie within the West riding, but generally in Yorkshire. But it was holden clearly, that though the words of the Statute be before the Justices of the Peace of the County, yet it will serve before a Justice of the Peace, of the West riding, if the land lie there. Quare of a Corporation, &c. Within a County. So in this case though the bar were naught, yet because the Plaintiff made no title in his replication, he could have no judgement.

Withes & Caffon.

Trespasse.

Hil. 12 Jac. Rot. 1964.

Withes brought an action of Trespasse against Caffon for taking of his Peats at Seaton, in a place called Borough Close. The Defendant answered for himselfe and his wife, and made Conusans for Elizabeth Caffon, and pleaded that Philip Fairfax Knight was seised of it in fee, and 2. of Octo. quinto Jac. did demise it unto Raph Lawson Habend. from the Feast of the Annunciation next after for 21. yeares rendering 10. pound per Annum at the Feasts of St. Michael and our Lady-day, and that Philip Fairfax 8. of September 8. Jac. by his deed reciting the lease in Supra, did bargain and sell the said reversion and that unto his wife and Eliz. Caffon Habend. for their lives if the said term of 21. yeares should so long endure, and for 25. pound rent held at St. Mich. in the 10. peere of the King he did abate and make Cognizance as before. The Plaintiff pleaded in barre that Philip Fairfax did not grant the said reversion modo & forma, the Jury found all the matter, just as it was laid by the Defendant, saying that they found that the lease unto Lawson, was made Habend. a Fetto Purific. and not a Fetto Annunciationis. And that Fairfax in his bargain, and



the sale of the reversion did recite the lease made unto Lawson, habendum & the Annunciation which was not so, and then granted the said Reversion and Rent prout. And yet the Court una voce gave judgement for the Defendant, and held it to be a good grant of the Reversion and rent which was the point in

**Marshall Versus Steward. Case.**

Mich. 13 Jac. Rot. 1134.

Marshall brought an action of the Case against Steward, reciting the Stat. of 1. Jac. of Invocation of soule spirits, (which was needless) for speaking these words unto him; The devill appears unto thee every night, in the shape of a black man, riding upon a black horse, and thou confersst with him, whatsoeuer thou dost aske him he doth give it thee, and that is the reason thou hast so much money. And after a verdict finding the words, the Court gave judgement for the plaintiffe.

Conferrest with the devill.

**Wilton & Hardingham. Trespasse.**

P. 14 Jac. Rot. 1531.

Wilton brought an action of trespass against Hardingham, the Defendant justified, that the Plaintiff was a Common Baker, dwelling in Tindles in the County of Norfolk, and that it was presented in a Leet in Tindles that he had sold bread against the Assize in locis vicinis, whereupon he was amerced, and by Amercement offered to 10. Shillings, and that by a precept of the Court, he did distraine the Plaintiff, and the Court gave judgement for the Plaintiff, because it doth not appear, that the office was committed within the jurisdiction of the Leet, which shall not be presumed with us except it be specially pleaded. But perhaps the presentment in the Leet is good enough without speciall mention in the presentment that it was done in the Jurisdiction if the truth were so. And yet note that the presentment is not so full in point, and therefore let them beware. And I noted that the Plea was abated, in as much as it was said that he was amerced without saying (what) and that the Amercement was offered to 10. Shillings, for which he distrained. Now the Defendant amerced to a certaine summe which may be mitigated and altered by the Court, and therefore these offices cannot be confounded.

Amercement in Leet.

**Cowley & Vxor, against Poulton & Vxor.**

Cowley and his wife brought an action upon the case, against Poulton and his wife, for scandalous words spoken by one of the women of the other woman. After a verdict, the Court was informed that one of the women was dead, whereupon judgement was stayed.

Death before verdict and stay of judgement.

**Sir George Grisley's Case.**

Sir George Grisley now Baronet, was bound in a Stat. of a 1000 pounds before the Mayor of Coventry to one Drury, and now upon a certificate made by the Mayor into the Chancery, took out a Capias against Grisley by the name of George Grisley Esquire, as he was named in the Statute returnable in last Terme. Whereupon writs of extent were made into the Counties of Derby and Stafford which were executed and returned. And now Mountague prayed that all might be amended. But it was denied by the Court. And it was willed to sue a new writ out of the Chancery upon the first Certificate, in Capias Corpus Georgii Grisley, mil. & Baronet. qui per nomen G. G. Armigeri recognovit, &c. for this was matter that must come of the information of the party.

Baronet must be sued by the title.

## Wilson's Case.

Bill not filed  
helped by ver-  
dict.

**O**ne exhibited a Bill de placito debiti versus Wilson an Attorney of this Court. And after a verdict it was moved in arrest of judgement that the original bill was not filed with the Custos brevium as it ought to be. But it appeared to the Court, that the tenor of the bill was entered of record in hac verba. And it seemed to the Court that this was remedied by the statute of Jeoffailes as being in the nature of a warrant of an original after verdict. But yet because it was said it had been otherwise ruled in the case of one Matthew Road an Attorney, the Court would advise.

Note that it hath been since judged in the Common Pleas cured by verdict, and is also in the Exchequer Chamber upon error out of the Kings Bench upon writ of a bill there, yet the words of the statute is [warrant of original writ.]

## Saint-John against Digges.

## Obligation.

Tr. 11 Jac. Rot. 3336.

Recital bind-  
eth not.

**S**aint-John brought an action of debt against Digges upon an Obligation, and the condition was, that the Defendant should pay to the Plaintiff 10 pound yearly for so long a rent of certain lands, the Defendant alleged that the Plaintiff had entered upon the land, and so suspended the rent, whereupon the Plaintiff demurred in law, and it was adjudged for him, for this being but a recital that it was so rent, it is not material. It seems the same, though he had applied it to pleading to the lease, &c.

## Wilby and Quinsey.

## Habeas Corpus.

H. 12 Jac. Rot. 2036.

Album breve.

**B**etween Wilby and Quinsey the Habeas Corpus was returned album breve, and thereupon a writ Veni fac. awarded.

## Oates and Frith.

## Trespasse.

Tr. 12 Jac. Rot. 3264.

Rent reserved  
to a sonne and  
heire apparent  
but not by  
name of heire  
uppon lease  
made by the  
Father.

**B**etween Oates and Frith the case was, that the Father being seised in fee, he and his sonne and heire apparent by indenture leased land unto the Defendant for yeares to begin after the death of the Father reserving rent unto the sonne; the father died, the lessee entered, and the rent was behind and the sonne disclaimed, and the lessee brought an action of trespasse and had judgement; for the reservation of the rent was held utterly void, for though the sonne did give heire, it bettered not the case by event, but the reservation must have been to the heire or heires of the lessor by that name; for that is the only word of pith in law requisite in reservation of rents and conditions, for the heire is in representation in point of taking by inheritance eadem persona cum antecessore. And though in law the rent could never be demanded by the Father, yet the heire shall take it from the Father as inherant and rising from the root of the reversion which was his fathers, and which he takes by descent from his father, and so the rent it self which was in the father, though not to demand, because it was not yet due, but yet it was so his that he might release and discharge it by the word rent, though not by the word action. And so note a difference between this case where rent is reserved upon a lease of the ancestors, to the heire first, and where the ancestor grants an annuity or makes a warranty for a time charge against his heires first omitting himself, all such grants are utterly void, for no man can charge his heire but as a part of himself, and therefore beginning with himself. And such charges stand naked and have nothing that

was first in the Father, and comes from him to them whereunto they may  
descend as a rent to a reversion in the former cases.

Robins against Barnes.

Hil. 13 Jac. Rot. 2108.

Quod permittit.

Robins brought a Quod permittat against Barnes, prosterneere quandam do-  
mum, &c. and counts that he was seised of an ancient house, and yard; and  
wherein in the East part of the said house there is, and time out of mind hath  
been, a window of such length and breadth, The Defendant hath erected a  
certain house of such length and breadth upon his own threshold, so near the said  
East part of the said house, that it overhangs the same, and stoppeth his light,  
&c. The Defendant pleads that one Richard Allen was seised of the Plaintiffs  
house and yard, and was also seised of a certain house, standing in the place,  
where the said house of the Defendant now standeth, which did overhang the house  
of the now Plaintiffs, in tam amplis modo & forma, as the said now house of the  
said Defendants doth. And he saith that he pulled down that house, because it was  
ruinous, and built this house in the place of it. The Plaintiffs maintaines his  
Claim, and traverseth that the old house superpendebat, &c. in tam amplis modo  
& forma prout, &c. And the Jury found for the Plaintiffs: And now it was  
in Arrest of judgement, that this was an imperfect issue; for there ought  
to have been some of the new house to be prostrated, than did indeed overhang more than  
the former house did, which was granted by the Court, if it had been wisely  
pleaded. For it was agreed by the Court that though one of these houses had  
been built overhanging the other wrongfully before they came both into one  
hand; yet after when they came both into the hand of Allen, that wrong now  
surpassed: so that if the houses came afterwards into severall hands, yet  
either party could complain of a wrong before: so that in this case it was  
said, that the Plaintiffs could have no cause of Action, but for the increase of  
the overhanging; But because he had not expressed and distinctly limited that  
in his Plea, but took issue generally as before, which was found against him,  
the Court must now give judgement according to the complaint as true; be-  
cause they can take no other knowledge, for the Jury hath not found that the former  
house overhanged so much, and not thereto; yet out of their discretion they gave the  
Plaintiffs judgement for the whole, and execution for damages and costs pro-  
prio; but stayed execution, as to the abating of the house till it might be distrest  
that was overhanging de novo; because the Court was informed, that in  
truth it was but a small matter. If I have an ancient house and lights, and I  
purchase the next house or ground, where yet no substance is done to my former  
house; now it is clear, that my privilege, against that I have purchased, con-  
tinues; for I may use mine own as I will. Now then suppose I would lease my  
former house, I may build upon the latter, or if I lease my latter, he may build  
upon me as it may seem.

Nasus by one  
house hanging  
over another,  
and they both  
came into one  
hand, and are  
divided again,  
and the like.

But now there is a great difference between Interests and profits, as  
Rents Commons, &c. and bare easements, such as are lights, ways, Cutters,  
Millidia, and the like; for though while they are in one hand, they may be stop-  
ped, or sojourned, because a man cannot be said to wrong himself, yet if they be  
divided, things of that nature (still in being) doe revive because they are of  
the same use of themselves in one hand then in divers, being equally (rebus stan-  
tibus in the same use and occupation) necessary for the severall houses to which  
they belong; but clearly, if even such things be sojourned or altered, while they  
are in one hand, and so being the houses be againe divided, they cannot be resto-  
red by law, but must be taken as they were at the time of the conveyance.



## Obligation.

Grantham against Hawley.  
Tr. 13 Jac. Rot. 3131.Civitas  
Lincoln.

Lessor cove-  
nants &c.  
that a Lessee of  
a terme certain  
may take the  
Corne that  
shall be grow-  
ing at the end  
of the Terme.

It is consider-  
ation whether  
the Law incline  
more to give  
the Corne to  
the owner of  
the Land or to  
him that sowes  
it in an indis-  
cussible case.  
Here if the  
Lessor sow it  
and then con-  
vey the land to  
A for life, re-  
mainder to B  
for life, re-  
mainder to C,  
and  
both dye I  
hold that the  
Lessor shall  
have the crop  
that he sowes.  
But if it had  
been sown by  
a Disfeisor or  
any other after  
the terme, it  
will accrue to  
the Executor  
of the then  
uncertain ter-  
mor.  
Grant or gift  
of that I have  
not actually,  
but potentially.

**R**obert Grantham brought an Action of debt upon an Obligation of 40.  
pound against Edward Hawley; the Condition whereof was, that if a cer-  
taine crop of Corne, growing upon a certaine peece of ground, late in the occupa-  
tion of Richard Sanke, did of right belong to the Plaintiffe: then the Defen-  
dant should pay him for it 20. pound. Now the case upon the pleading and de-  
murrer fell out thus: That one Sutton was seised of the land, and 30. Eliz. in  
April, made a Lease of it to Richard Sanke for 21. yeares by Indenture, and did  
thereby covenant and grant to and with Sanke, his Executors, and Assignes,  
That it shall be lawfull for him to take, and carry away, to his owne use, such  
Corne as should be growing upon the ground at the end of the Terme. Then  
Sutton conveyed the reversion to the Plaintiffe, and John Sanke, Executor to  
Richard, having sowed the Corne, and that being growing upon the ground at  
the end of the Terme, sold it to the Defendant. And it was argued by Sutton  
for the Plaintiffe, that it was merely contingent, whether there should be  
Corne growing upon the ground at the end of the Terme, or not. Also, the  
Lessor never had property in the Corne; and therefore could not give nor  
grant it, but it sounded properly in covenant; for the right of the Corne stand-  
ing in the end of the Terme being certaine, accretes with the land to the  
Lessor; And it was said to be adjudged, And it was agreed by the Court, That  
if A. seised of land, sowe it with Corne, and then convey it away to B. for life,  
remainder to C. for life And then B. dy before the Corne reapt, not C. shall have  
it, and not the Executors of B. though his estate was uncertaine. Now the reason  
of industry and charge in B. failes, yet judgement in this case was given against  
the plaintiffe, that is, that the property and very right of the Corne when it  
happened, was past away; for it was both a covenant, and a grant. And there-  
fore if it had been of naturall fruits, as of grasse, or hay, which ran merely  
with the land; the like grant would have carried them in property after the  
Terme. Now though Corne be fructus industrialis, so that be that sowes it  
may seem to have a kinde of property ipso facto in it divided from the land;  
and therefore the Executor shall have it, and not the Heires; Yet in this case  
all the colour that the plaintiffe hath to it, is by the Land which he claimes from  
the Lessor which gave the Corne. And though the Lessor had it not actually  
in him, nor certaine, yet he had it potentially; for the Land is the mother and  
root of all fruits. Therefore he that hath it may grant all fruits that may arise  
upon it after, and the property shall passe as soon as the fruits are eriant, as  
21 H. 6. A Person may grant all the Weth-wooll that he shall have in such a  
yeare; yet perhaps he shall have none; but a man cannot grant all the wooll  
that shall grow upon his Sheep that he shall buy hereafter; for there be hath  
it neither actually, nor potentially. And though the words are here not by words  
of gift of the Corne, but that it shall be lawfull for him to take it to his owne  
use; it is as good to transfer the property, for the intent and common use of  
such words, as a Lease without impeachment of waste, for the like reason,  
and not ex vi termini, gives the trees.

*Moon against Andrewes.*

P. 12 Jac.

Debt.

Leicester  
Brownlow.  
Administrator  
pleads plea  
Administ. &c.

Moon brought an Action of Debt against Andrewes as an Administrator. And he pleads that another had gotten a judgement against him for an hundred pound, and that he had fully Administered, and that he had no goods in his hands tempore brevis originalis, nec tempore judicii predicti, nec unquam postea praterquam bona & Catalla non attingentia to an hundred shillings; whereupon the Plaintiff demurred in Law generally. My Brother Winch and I were of clear opinion, that the Plaintiff ought to be barred; for though he is in the right form of pleading he should in such case set down in certain to what the goods were; yet that is but form; for if he had said that he had goods to the value of 100. shillings, and the Plaintiff had proved that he had 100. pounds, yet he had gained nothing. So the substance appears in this Plea, that he is not able to satisfy the judgement. And the Stat. of 27. Eliz. is a favourable Law and full of equity, which Judges ought to catch, and not to shrink; and in the repugnancy that may seem to be in that he pleads first plenient admistratorem, and yet afterwards confesseth somewhat unadministered: All the points are so, and the praterquam corrects all, and the unquam postea refers not only to the next antecedent tempore judicii, but also to the time of the original before. But Warburton did a little doubt of the first point.

*Allen against Walter.*

Dower:  
Hertford.  
Summons at  
the Church  
doore by the  
Stat.

Allen and his Wife brought a Writ of Dower against Walter of Lands in Munden magna, & Munden parva: And Thomas Broxborne the Sheriff returned pledges & summoners, & then added that post Summon predictam in forma predicta factam, he did at Munden magna, where part of the Tenements lie, at the most usual doore, &c. cause to be proclaimed all that was contained in the Writ, although the words of the Statute of 31. Eliz. be somewhat doubtful (viz. in Churches or Chappels where Lands lie) yet the opinion of the Court was, that the Proclamation in one Town was sufficient. First in imitation of the Common-law, where summons upon the Land in one Town is sufficient. Next, the words of the Statute are for avoiding of secret summons, and to give convenient notice to the parties, for that is the word, both which are sufficient in this one Proclamation.

Lastly, other exposition would be full of mischief, for the Land may lie in two, and so the notice must be at every Town and every one upon a Sunday, and every one 14. daies before the return of the Writ; and though there were no actual summons returned, but only the names of the summoners, that was not regarded. For that is all the form at the Common-law, and there is no alteration made by the Statute in the point of summons; but where he did return that he had proclaimed the contents of the Writ, that was insufficient; for he must proclaim that he had made summons of the Land.

*Howell against Samback.*

Mich. 13 Jac. Rot. 2009.

Between Howell, and Samback; the Defendant, made abowry and confessed himselfe to 5 pound Rent due such a day, and for non payment thereof 10. pound nomine poens; but laid no actual demand of the Rent, and concluded that for the same 85. pound he did disfrain, and so abows. And it was resolved by the Court, that this Abowry was insufficient for the pain, which could not be forfeited without actual demand of the Rent; and yet the Return was adjudged unto him, because he had just cause to disfrain for the Rent, and they appeared to the Court to be severall.

Demand re-  
quisite where  
there is forfei-  
ture of a  
pain,

Wike

Debt.

Wike againſt Wright.

**W**ike brought a Bill of Debt againſt Wright an Attourney of the Court; and after ſine found for the plaintiffe. It was alledged that there was no Bill to be found filed with the Cuſtos brevium, as it ought to be. And it was firſt queſtioned to be within the equitie of the Law of 18. Eliz. of want of original Writ; for the Bill is the original in this caſe: But upon that there was no reſolution: for it was proven by oath that there was a Bill, and that the Defendant had accepted it, and ſubſcribed it, and it was entred in hanc verba upon the Roll. And ſo the Court ordered that a new Bill ſhould be filed.

Treſpaſſe.

Weaver againſt Ward.

P. 14 Jac.

London.  
Brownlow.

One Trayne  
Souldier hurt-  
eth another  
by miſchance  
in ſkirmiſh.

**W**eaver brought an action of treſpaſſe of Aſſault and Battering againſt Ward. The Defendant pleaded that he was amongſt others, by the commandement of the Lords of the Council a trapped ſouldier in London, of the Band of one Andrewes, Captain; and ſo was the Plaintiffe, and that they were ſkirmiſhing with their muſkets charged with powder for their exerciſe in remilitari againſt another Captain, and his Band; and as they were ſo ſkirmiſhing, the Defendant caſualiter & per infortunium & contra voluntatem ſuam, in diſcharging of his Peece, did hurt and wound the Plaintiffe, which is the ſame ec. abſque hoc that he was guilty aliter five alio modo. And upon Demurrer by the Plaintiffe, judgement was given for him; for though it were agreed that if men ſtill or Turney in the preſence of the King, or if two ſouldiers of Defence playing their prizes kill one another, that this ſhall be no felony; or if a Lunaticus kill a man, or the like, becauſe felony muſt be done animo felonico: yet in treſpaſſe which tends only to give Damages according to hurt or loſſe, it is not ſo; and therefore if a Lunaticus hurt a man, he ſhall be anſwerable in treſpaſſe: and therefore no man ſhall be excuſed of a treſpaſſe, (for this is in the nature of an excuſe, and not of a juſtification, pious ei bene licuit) except it may be judged utterly without his fault.

There are three  
degrees to a-  
void the charge  
of a treſpaſſe.  
Infliction, not  
guilty:  
Juſtification, as  
de ſum Aſſault:  
&c. Exculation  
as this.

As if a man by force take my hand and ſtrike you, or if here the Defendant had ſaid that the Plaintiffe ran croſſe his Peece when it was diſcharging, or had ſet forth the caſe with the circumſtances, ſo as it had appeared to the Court that it had been inevitable, and that the Defendant had committed no negligence to give occaſion to the hurt.

Debt.

Coventry againſt Woodhall.

Hill. 13 Jac. Rot. 2588.

London.  
Goldſbrowe.

Apprentice  
ſent out of the  
realm.

**C**oventry brought an Action of Debt againſt Woodhall for twenty pound. The condition was, that whereas one Rathborne had bound himſelf Apprentice to the Defendant for eight years, the Defendant did covenant with the Plaintiffe that he would retain, teach, keep, and employ the ſaid Apprentice in his owne houſe and ſervice, in the Art of Chirurgery during the terme, and bound himſelf in twenty pound for performances of thoſe covenants. And then it is ſhewed that within the terme, the Defendant ſent his ſaid Apprentice in a voyage to Bantam in the Eaſt Indies, which he pleaded to be in the company of other expert Chirurgeons, the better to learn the Art; whereupon the Plaintiffe demurred, and judgement was given for him; for it was expreſſely againſt this covenant; for though the covenant were not ſo reſtrained to the houſe in meaning; but that he might ſend his ſervant, or Apprentice into other places about his cures, yet he muſt be ſtill as one of his Houſhold coming and going, and in his ſervice, and not put over to any other; for as I ſaid the matter of putting an Apprentice in a matter of great truſt for his dyet,



pet, for his health, for his safety; and therefore I will by choice commit him to one, and not to another. And generally no man can force his Apprentice to go out of the Kingdom, except it be so expressly agreed; or that the nature of the Apprenticeship doth import it, as if he be bound Apprentice to a Merchant-adventurer, or a Sailor, or the like.

*Pie against Thrill.*

Information.

Pie informed against Thrill upon the Statute of Recusance, who pleaded that he was indicted in Middlesex for the same offence, and the Plaintiff produced the Record, and day given to the Defendant to bring in the Record; whereupon he took a Certiorari Justitiarum pacis out of this Court, and at the next brought tenorem Recordi certified by Sir Thomas Lake Custos Rotulorum. And it was holden clear that the Defendant did not need to take his Certiorari out of the Chancery, and so to bring it thither by Mitrimas. But this Court might send this Certiorari immediately to an inferior Court, and so are the books cited, 6. 13. & 19 H. 6. 19. But if it were to certify the Record it self, as upon a Writ of Error, or a Certiorari out of the Kings Bench to a Justice of Peace, they remove the very Record it self to hold plea upon, there it were otherwise; but here the Certificate was disallowed, because it ought to have been made in the name of the Justice of Peace, before whom it was taken, according to the tenor of the Writ; though the Custos Rotulorum keep the Records, and yet the Chief Justice of the Common-Pleas alone certifies all Records upon Writs of Error; for the Writs are directed only to him. But it appeared after that the Plea was of a conviction before the Justice of Gaol-delivery, and by the Certiorari and all was void: and yet because that it was the award of the Court, it was not made as a nullity of the Record in the Defendant, though he was not at the day; but a Certiorari was awarded de novo to the Justice of Gaol-delivery.

Record certified  
per Custos Ro-  
tulorum.

*Denny against Lemman.*

Trespasse.

Denny against Lemman. The case was thus: That the Copyholder brought a Demand of Trespasse against his Lord, for an house and an Acre of land. The Defendant pleaded, that he had admitted the Copyholder, and had assessed a Fine of twenty Nobles upon it, and had appointed him to pay it to the Plaintiff, at his house being within the Manor, three moneths after, and alleged that he had not paid it accordingly: whereupon the Plaintiff demurred, and the opinion of the Court was, That the Lord was not bound to abet, or allow that the fine assessed was reasonable, but it must come on the Copyholders to shew the circumstances of the Case, to make it appear to the Court to be unreasonable, and so to put it upon the judgment of the Court. For the Fine in Law is arbitrary, and is due to the Lord of common right: and it is only in point of excuse to the Tenant if it be unreasonable, which the Court cannot judge, but upon the fact agreed: And the Copyholder if he be a Defendant, may plead not guilty; and then it shall come in evidence whether the Fine were unreasonable or no. But yet the opinion of the Court was against the Lord in this case, because he had not laid a demand of his Fine, at the time it grew due, or some time after, of the person of the Tenant, as the Lord must doe in case of Seizure of Copyhold both for Rent, and Fine.

In a Copy-  
hold the unrea-  
sonableness  
of the Fine  
must come on  
the part of the  
Tenant.

Griffith

Devise.

## Griffith Floods Cafe.

Hill. 13 Jac.

Stat. of char-  
table uses.

**I**n the Court of Wards was this case: One Griffith Flood a Doctor of Laws being seised in fee of lands in the County of Cardigan by Devises anno 1571, and in August 25 Eliz. devised the same unto Anne his wife for her life, and after to Jane his daughter for her life, and after these lives ended to the Widewall, Fellowes, and Scholars of Jesus Colledge in Oxford, and their successors to and a Scholar of his blood from time to time, and died. The lives ended, Bridget Lloyd the heiress of Griffith Flood, being the Kings ward, entered. And upon a case made hereof in the Court of Wards, and by order of the said Court brought unto the Chief Baron and my selfe to be resolved; we agreed that the devise was void in law; because the Statute of Wills did not allow devises to Corporations in perpetuities; but yet we held it clearly within the reliefs of the Statute of Charitable uses of 43 Eliz. under the words limited and appointed. And so it was decreed that the Colledge should enjoy it against the Ward and his heires. And it was likewise held by us, (and so is mentioned in the Decree) that the Proviso in the Statute which exempts Colledges, is only intended to exempt them from being reformed by Commission, but not to restrain gifts made to them.

Devise.

## Collifons Cafe.

P. 15 Jac.

Chance.  
Stat. 43 Eliz.  
of charitable  
uses.

**C**ollifon 15 H. 8. devised an house in Eltham in Kent to Lettice his wife for life, and after her death made John Bricker and others, Feoffees (as he called them) in the said house, to keep it in reparations, and to bestow the rest of the profits upon the reparation of certain high wayes there. Collifon and his wife are dead; and the house is descended to one Oliver Rolt an infant. This Cafe being in the Chancery between the parsoners and Rolt, was referred by the Court to me and Tanfield: and we resolved clearly that it was within the reliefs of the Statute of 43 Eliz. for though the Devises were utterly void, yet it was within the words (limited and appointed to charitable uses;) otherwaile, if he were an infant, lunatique, or the like, that gave it, or that one appointed that, that were not his owne to charitable uses.

Inquisition.

## Dimmocks Cafe.

Pasch. 15 Jac.

These Cases came out of the Court of Wards to us.

A Deed of  
Bargaine and  
sale enrolled  
after the  
death of the  
bargainer.

**I**t was found by Inquisition, after the death of Sir Henry Dimmock in Com. Warwick, 20 Decembr. 13 Jac. That one Bull and Wilcocks did by Indenture, dated 3 July 13 Jac. bargain and sell the Manor of Pye to the said Sir Henry and his heires for money, and that he dyed 4 Octob. 13 Jac. and after his death, and not before, that is to say 23. ejusd. Oct. the deed was enrolled. And that Anne Dimmock was his cozen, and heire, and of full age; and that the Manor was holden in chiefe. And it was resolved by Mountagbe, Tanfield, and my selfe, that Anne Dimmock was to sue liberty; for we agreed, that this differed from all the cases that are put in Shellyes case of Recovery for Fine executory, Covenant to raise uses, as in Woods case there, and the like where the estate vests in the Heir, though quasi heire, that never was in the Ancestor, for this upon the Enrolment settles in Law, as between the Bargainer and Bargainee, ab initio, upon the Statute of 27 H. 8. of uses which doth join all Estates to the uses ipso facto: only the Stat. of Enrolment sales, that in that case it shall not vest, except the Deed be Enrolled, so that if it be enrolled, it doth vest, not by the Stat. of enrolments, but by the Stat. of uses presently. Yet it was agreed that the Bargainee cannot bargain and sell unto another, before his owne Deed be enrolled; as was judged in Bellinghams Case.

Burchers

**Burchers Case.**

Lunatique.

S<sup>r</sup> Ralph Burcher being seized of divers manors in the County of Yorke, and in Cheshire, died Anno 40. Eliz. and the same descended to William Burcher. Shortly after his death, it was found by his Office before Commissioners in the County of Middlesex, that the said William Burcher was Lunatique, and so had been long before the death of his Father, and that he was seized of the same manors; and the Queen granted the custody of him and his Lands to Sir Francis Barrington. After which 43. Eliz. there was an Office found in the County of York, of the seizure of S<sup>r</sup> Ralph, his death, and that he was of full age; and we resolved the King was not to have any mean Rates in this case for default of Liberty sued or tendered; and no Laches could be imputed unto the Heir being Lunatique before, and since the death of his Ancestor, and the Laches of his friends shall not hurt him. Otherwise it were, if at any time he had been sane memoriam the death of his Ancestor. And there was shewed unto us the like Decrees Mich. 10. Jac. in the case of one Vaughan, which Master Attorney of the Wardes said was made as a Decree at Quittie, but we resolved also, it was a good Decree in Law, upon the reason aforesaid; not because the King was seized, and committed by force of the Lunacie, for that would have changed the Kings better estate, for it is better for the King to hold for default of a Heir, then for Lunacie.

Lunatique  
 (such not live-  
 ry: no meane  
 rates runne  
 against him.

And livery  
 was due to him  
 and the Law  
 presumes that  
 he would have  
 sued it being  
 for his benefit,  
 if he had been  
 Compos mentis.

**Edward Earle of Bedford, against William Bishop of Exeter, and Henry Wilson Clerk of the Church of Buckland.**

Tr. 14 Jac. Rot. 245.

Devon.  
 Waller.

Quare Imped.  
 cannot be  
 brought hang-  
 ing another a-  
 gainst the same  
 Defendant,  
 and for the  
 same avoy-  
 dance.

Edward Earle of Bedford brought a Quare impediat against William Bishop of Exeter, and Henry Wilson Clerk of the Church of Buckland, and conveyed unto himselfe the Advowson in Tayl; and then shewes that he granted the said Advowson unto one Wallish, and others; and that the Church voided by the death of Wheeler; and that the Church presented Iohn Hopkins, who was admitted, &c. and died, and so it pertains to him to Present, and the Defendants disturbed him. To this the Defendants pleaded, that before this purchase, that is to say in May 10 Jac. the Plaintiffe did purchase a Quare Impedit against this Bishop Defendant of the same Church; whereunto the Bishop appeared, and the Plaintiffe declared against him, and conveyed unto himselfe the Advowson in Tayl, and that the Church became void by the death of Wheeler, and that he presented Iohn Hopkins; who was admitted, &c. and dyed. and so it pertains to him to Present; whereunto the Bishop Defendant imparied, and shewes that it is the same Earl, the same Hopkins, the same Advowson, and the same disturbance, whereupon both actions are brought. And that the first action depends, yet not discontinued, discussed, nor determined; and demands judgement of this later Writ purchased, (a little) whereupon the Plaintiffe now declares, bringing his first Writ. The Plaintiffe replies, that after the purchasing of the first original Writ, that is to say, the first day of December Anno 12 Jac. the same Church being still void, and he still seized of the Advowson in Tayl (as aforesaid) presented one Henry Carris his Clerk to the Bishop, praying him, &c. who refused him, which is the disturbance, whereupon he now declares; and shewes without that, that it was the same disturbance, whereupon both actions were brought, and upon this the Defendants demurred in Law: and in the end of Easter Term, 15 Jac. after some argument at Bar before had; we all agreed, and I pronounced the judgement, that this Writ ought to abate; for though there must be a disturbance naturally to maintain the action, yet the principall effect of the Suite is, to gain and recover the Presentation. And therefore for the same thing you shall not have two suits at once. And here was a disturbance



disturbance laid in the former suit, and the avoidance the same; so that the new disturbance betters not the case for the Plaintiff. Besides, the nature of a Quare Impedit is to be final upon Point, or discontinuance; but this way were to defeat that, for the Plaintiff, not leaving his former suit, may bring a new one. And by the same reason, twenty, which were an intolerable vexation, might be made of Law, and the adding of a new Defendant to the former, amends not the case; for still there are two depending against one man. Otherwise it is not Quare Impedit, were against ten, by adding another to them, he might have a new Quare Impedit, and so in infinitum; but he may have as many as he will against severall persons.

Star-chamber.

Ebor.

Bill in Star-chamber hath shew of felony.

Murder upon a Riot.

Ejectione.

In Scacario.  
Quo minus.County Pala-tine of Durham  
triall there out  
of the Exche-  
quer, and Cer-tificate from  
thence.

Sir Stephen Procter against Darnbrook, and others.

Jac. 15 Jac.

**I**n the Star-chamber in a suit between Sir Stephen Procter Plaintiff, Darnbrook, Armitage, and many others Defendants; for Divers, and several, by one horrible Riot committed by them all, in Beverly Moor, about a hundred, and selling of ill goods about them; because it appeared upon the hearing of the Cause in part, that it was deposited by them, that one Wetherall (which was probably part in this Riot, did not suffer them to come the after) and being before an able man, he would charge one of the Risors with the death. By order of Court two righte Justices, together with the rest of the Judges considered, and it was ordered that the case should proceed here; and related that the case appearing thus, it exceeded the capacity of the Court, and was of dangerous consequence, though it were laid but a Riot in the Bill, since it fell out to be likely to be a murder in them all, by these means, the relief because the proofs were read by the Plaintiff himselfe, and his Interrogatories tended to that end, and he himselfe had prosecuted it, as a murder long since, and therefore we held it fit that he should be ordered to prefer his Bill of murder, and bring his witnesses together at the next Assizes, and there his Bill and Evidence to be given in upon Court before the Justices of Assize to the great Inquest; and then if the Bill were found to proceed as for a felony, it not to returne hither again upon the Riot, and to be so heard.

Anthony Morton against Thomas Orde, and others.

**A**nthoni Morton brought an Ejectione firme against Thomas Orde, and others, for a land in Morton in the County of Durham, as debitor in the King, Quo minus, &c. And the Defendant pleaded not guilty, & de eo ponit se, &c. Et præd. Anthonius similiter Jo. fit inde Jur. Et quia exit præd. superius junct. per homines de visne de Morton in Com. Dunelm. præd. (ubi Breve Domini Regis non currit) & non alibi triari debent, Ideo quoad triandum exitum illum Recordum loquela præd. mandetur Episc. Dunelm. & ipse ulterius mandet Justic. infra libertatem illam idem Recordum, ita quod illud habeant ad prox. curiam apud Dunelm. præd. prox. tenendum, post quam idem Recordum sibi deliberatum fuerit ad verificationem præd. exit. ibm. faciendum, & Dies dat. est tam querenti quam defendenti tunc. ibm. &c. Et cum verificatio exitus ibm. facta fuerit quod tunc præd. Episcopus Recordum loquela, præd. cum toto eo quod in præd. curia prox. facta fuerit Baronibus hic mittat ad certum diem quem idem Justiciarii partibus præd. in eadem Curia hic præfigant. And then follows the Bishops Certificate thus. Ego Gulielmus Episcopus Dunelm. Baronibus de Scac. certifico quod secundum tenorem Brevis Domini Regis de Mittimus mihi direct. & huic Recordum annex. ad curiam Domini Regis tenet apud Dunelm. Die lunæ 26. Julii Anno Regni Regis Jac. 21. coram me præfat. Episcopo, Jac. Altham, & Ed. Bromley, &c. Justiciariis Dom. Regis in Com. Dunelm. & Sadberg. existen. prox. cur. &c. Postquam idem Recordum mihi deliberatum fuit, mandavi idem Recordum eisdem Justiciariis Dom. Regis ad verificationem exit. &c. And then comes that the same day the parties came, and the Plaintiff prayed sibi fieri, quod lex suaderet, &c. And commandement was given to the Sheriffe,

Sheriffe, quod venire fac. ad horam primam post meridiem ejusdem Diei duodecim, &c. And that then the parties came, and the Sheriffe returned his Writ served with a pannel, but the Jury came not, and so it was continued by habeas corpora from day to day, till the 8. of August Anno 12 Jacob, and then the Jury passed and found the Defendants guilty, and assessed damages, and costs, and the Justices pressed a day to the parties in Octab. Mich. tunc prox. cur. coram Baronibus, &c. Ad quem diem ego prefatus Episc. Recordum prod. cum toto eo quod inde in dicta cur. apud Dunelm. fact. fuit Baronibus, &c. juxta tenorem brevis, &c. mitto. Whereupon judgement was given for the plaintiffe, and a Writ of Error brought, and one Error was assigned; That it was not confessed that the Cause could not be tryed but at Durham, as it is used in cases of challenge by the Plaintiffe to the Sheriffe, to remove it to the Coroner. But it was answered, that that was matter of meer surmise, and therefore required the confession of the Defendant, but this was matter apparent to the Court, and therefore the Court Ex officio did award the writ ut supra. But the chief Error whereupon it was insisted, was; That the Mittimus is to the Bishop, in ipse ulterius mandet Recordum Justiciariis &c. Now it appears by his Certificate, that he was one of the Justices himself, so that he could not send the Record interest in one to himself; and indeed this Certificate varied from former Presidents, as which did never mention that the Bishop was a Justice himself.

Now this appears to be the practice ever since the Stat. of 27 H. 8. which took from the Bishop, and gave to the King the making of the Justices there. But yet notwithstanding the form of the Mittimus is continued to the Bishop, but he should send to the Justices as before; only they are now called the Kings Justices, which they were not before. And it seems that the Mittimus might well enough, upon the Stat. 27 H. 8. have been directed to the Justices themselves immediately; and yet this way also may be good, because the Statute did make no alteration in that point, and the Presidents have continued so; now it appears also that the Bishop is the first man in Commission with the Judges, ever since the Statute for honours sake, so that the substance of certificates have been in effect, as now this is; saving that the Bishop hath not named himself a Justice expressly, as in this he doth. Whereupon Mountague Chief Justice, and my self, after hearing of some arguments resolved, that the certificate was well enough, and that the words mandavi Recordum Justiciariis was in force in effect, but habui Recordum coram Justiciariis, which was true. And I brought the Record into the Court holden before himself, and other Justices. And though the proceedings were not all ad prox. cur. but upon many adjournments, it was well enough; but the Record must be delivered into the Court not after it is received, and then to proceed as it may; for all cannot be finished at the first Court, and so we reported to the Lord Keeper, and Lord Treasurer in the Exchequer Chamber, and so judgement was affirmed.

### Norris against the Hundred of Gawtry.

Hil. 14 Jac. Rot. 431.

Norris brought a Writ upon the Statute of Hue and Cry against the Hundred of Gawtry, and the Robbery was layd as it was indeed, 9. October. 13. Jac. And the Teste of the Writ was 9. Octob. 14. Jac. And after a Verdict for the Plaintiffe, it was moved by Harvy, that the Writ was not brought within the years after the Robbery committed, which are the very words of the Stat. 17 Eliz. And it was agreed, that in the case of Protection, the years shall be counted from the day of the Date. And so in Deeds enrolled, the day of the Date shall not be counted any part of the six monthes. And Justice Warburton held it so also in this case. But Justice Winch and I, were of a contrary opinion, in cases that depended not upon writings dated but upon time to be reckoned from Actions, as in this case from the Robbery committed, which must be confessed, was done upon the ninth of October, 13 Jacob, and there cannot be five ninth

11 Eliz. Dier  
286. Ejectione  
firma.

dayes of October in one year; and he might have brought his action the same first day, without doubt. And though it is true, that a Deed may be enrolled the very day of the Date, yet that is by reason of the intent of the Law, and not by the letter. If a Lease be made from the making of the Lease, it takes effect presently the same day, whether it be dated, or no: so if the Bargain and Sale be not dated, the six moneths must be reckoned from the delivery. And though the party Robbed, deserves relief and pity; yet against the Hundreders, which are innocent, it is a very penall Law, and so the plaintife could not have his Judgement.

### Thornton against Iebson.

Hil. 14 Jac.

Cafe.

Common Bar-  
reter.

Thornton brought an Action of the Case against Iebson, and layd that where he was a Carrier, and a man of honest fame, that the Defendant had said of him, that he was a common Barreter. Now we were of opinion, that if those words were spoken of a Justice of Peace, or publique Officer, or of an Attourney, or the like, that they would bear an Action.

*De termino Sancti Mich. anno 13, 14. Eliz.*

Vide 16 E. 3 F.  
Qu. Imp. 67.

Bendloes dd. l' opinion del Court in cest cas; Roy seisy dun Manor, a que Advouson est appendant, estrange present, & son Clerke eins per 6. mois aient conusant al Councell le roy, & puis le Roy per ses lettres Patents grant le Manour ouel' advouson a estrange l' incombent devy si le grantee poit present est le Question, & suit tenu per Curiam que il poir; car l'advouson fait tous dits, appendant & le inheritance de ceo passe al grantee. Car si common person soit seise d'un manor a que advouson est appendant & estrange present, & son Clerke est eins per 6. mois ore l'advouson est disappendant tanque l'auter ad reconitinne ceo per breve de droit l'advouson mais nest issint in le cas del Roy, car home ne poit mitter le Roy hors de possession per presentment ou usurpation; mais le patentee ne avera, Quare Imped. del primeir disturbance, car ceo remain in le Roy pur ceo que le Roy nad donne ceo estant chose en Accon. si non que il fait aucun mention de ceo eo son grant. Et suit agree que le patentee avera le prochein Avoydance & en Quare Imped. fera son tittle per le darraine presentment de Roy sans fair mentlon de presentment del estrange.

Usurpation  
upon the King,  
yet he may  
grant the  
Advouson.

### Commendam Cafe.

Quare Imped.

John Colt & Glover, against the Bishop of Coventry & Lichfield.

Mich. 10 Jac. Rot. 2642.

Stafford.

The Great case  
of the Com-  
mendam, in the  
chequer-cham-  
ber adjourned  
thicker out of  
the Common  
Pleas.

John Colt, and William Glover, bying a Quare Impedit, against Richard Bishop of Coventry and Lichfield, of a Presentation to the Church of Clifton Camvill; and declared that one John Standley Esquire, was seized of the Manor of Clifton Camvill and Hampton, with the appurtenances; to which th' Advouson did belong, and died seized, and it descended unto Elizabeth and Isabel his Daughters and Heires, and then byingeth the Manor and Advouson to Herley and Moyle, by whom the next avoydance, 4 E. 6. was granted to three: And then that whole avoydance came to one of those three, scil. to Jeffrey Walkenden; then the Church avoyded by the death of Humphrey Standley Incumbent. And so Geffery Walkenden presented William Walkenden, who was admitted, instituted, and inducted, and then byingeth down the whole Manor and Advouson to Walter Henningham, &c. And Henningham entered into the whole Manor, cum pertinentiis ad quod, &c. and was seized in title, and so seized postea scil. 11 Jac. made a grant of the next avoydance unto Colt and Glover the Plaintifes, and then the Church avoyded by the death of William Walkenden the Incumbent, and so it belongeth to the Plaintifes to present, and avers the life of Walter Henningham the Manor.

The



The Defendant confesseth all the conveyance of the Abbouson, and the first grant of the aboydance by Hersey and Moyle, and the death of Stanley the In-  
herent and the presentation of William Walkenden, and that he was admitted;  
and instituted accordingly. But then he pleadeth the Stat. of 21 H. 8. of plu-  
ralities; and that Clifton Camvill was a Benefice with cure and above 8  
pound per annum, and that Will. Walkenden in December 3 Eliz. took the  
Benefice of Yelvertoft in the County of Northampton, and was therein ad-  
mitted, instituted, and inducted. And so Clifton Camvill became void, and re-  
mained void 18. moneths, and so it accreted to the Queen by lapse to present,  
and then the Queen died, and so it doth belong to the King to present, and then  
passed the Statute of 25 H. 8. of dispensations at large giving power of dis-  
pensation to the Archbishop of Canterbury, and in the Vacation to the Con-  
vent of the Spiritualities; & then pleadeth that in November 1610 the Dean and  
Chapter of Canterbury being Guardian of the Spiritualities the sea of Canter-  
bury being void after examination of the causes and qualities of the said Bishop  
of Rochester, now elect of Coventry and Lichfield, reciting by their Letters  
patents of dispensation, the petition of the Defendant then being Bishop of  
Rochester, and elect Bishop of Coventry and Lichfield, was insufficient; and  
that he held already the Rectory of Southfleet in Kent in Commendam with  
his Bishoprick of Rochester. And therefore to provide for a Bishops Seat, and  
that it should not be voided, did grant, inter alia, ut Rectoriam de Southfleet,  
nec non ut unum aliud, vel plura Curata, vel non Curata, Beneficia Ecclesiarum  
in Regno Angliæ, cujuscunque nominis, qualitatis, aut dignitatis in Commenda-  
m idem obtinere, acceptare, & recipere; ac propria sua Autoritate capere &  
apprehendere; ac realem, actualem, & Corporalem possessionem ejusdem, absque  
institutione, Collatione, Inductione vel alia quacunque Juris Solemnitate, intrare;  
ac omnes Decimas, proficua, &c. quam diu viveret, & dicto Episcopatu Coventry  
& Lichfield præficeret, in Commendam tenere, possidere, & habere, & in suos pro-  
prios usus, & utilitatem convertere; ac de eisdem omnibus, & singulis integre,  
pro suo Arbitrio, libere & licite disponere possit, in tam amplis modo & for-  
ma, & effectu, ac si Episcopatum non fuisset assequutus, ac si eadem in titulum  
Canonicum ac cum legitimâ dispensatione possideret, ac in eisdem debitam &  
personalem Residentiam faceret; Ac sicuti veri Rectores & Incumbentes con-  
vertere possent, licet non faceret Residentiam. And then grants him like power,  
pro arbitrio suo, to resign and change, and others in their place propria sua  
Autoritate capere, apprehendere, &c. ut supra. And then dispenseth with Non-  
Residence, that he should not by any means be compelled unto it, quantum in  
ipsius & jura regni paterentur; Canon, decretis, constitutionibus localibus  
Sæc. five Ordinationibus Ecclesiasticis generalibus, vel specialibus, etiamsi juramen-  
to Religionis, vel quovis alio modo confirmatis, vel corroboratis, in contrarium  
non obstantibus. Provided that all his Benefices of all sorts should not exceed 200.  
pounds in the Kings books. And provided, quod Beneficia prædicta obtenta, vel  
obtinenda debitis non fraudentur obsequiis. And then he pleadeth the Kings con-  
firmation ordinary 8 Jac. per literas suas sigillatas juxta prædictum Actum &c.  
That he should enjoy all things contained in the dispensation, secundum vim,  
&c. earandem and the Inrollment of the Dispensation, and then averreth that  
the cause of this Dispensation was not repugnant to the law of God. And that  
the dispensations were used to be had at Rome, before the making of the said  
Act by Bishops, subjects to King H. 8. And that the said dispensation was not  
against the Statute of 21 H. 8. of Non-residence. And then he sheweth that  
he was made Bishop of Coventry and Lichfield 6 Decembris 8 Jac. concurrenti-  
bus his, &c. And then that the King ratione prerogativæ suæ Regiæ, per lapsum  
temporis sibi devoluti, by his Letters Patents under the great Seale of  
England, dated 27 Martii 10 Jacobi, ad prædictam Ecclesiam de Clifton Camvill  
per lapsum temporis vacantem, & ad suam presentationem spectantem  
presentavit eundem Episcopum, eandemque Ecclesiam ei commendavit; Ita  
quod eidem Episcopo bene liceret dictam Ecclesiam in Commendam  
obtinere

The Barre.

The Commenda.

Non obstantibus.

Conditions.

The Kings  
Presentation.

Innoce ad  
Annoq nian

obtinere, & propriâ suâ Authoritate capere, & apprehendere; ac corporalem possessionem ejusdem absque Institutione, Collatione, Inductione, vel aliâ quacunque Juris solennitate intrare; ac Decimas & Proficua ejusdem quamdiu viveret & dicto Episcopatu præset in Commendam tenere & habere, juxta & secundum vim, formam, effectum, & tenorem dictarum literarum dispensationis licentiam concessit. Ad quam rem ad debitum effectum producendum, Dominus Rex per dictas literas suas Patentes Regiam suam supremam Authoritatem, tam in spiritualibus, quam in temporalibus, prærogativam suam Regiam adhibuit, Virtute quarum quidem literarum dispensationis, & separalium literarum Patentium Domini Regis, idem Episcopus, 28 Martii Anno Decimo predictam Ecclesiam de Clifton, &c. in Commendam accepit, & intravit; atque eam semper postea hucusque in Commendam habuit, & habet, absque hoc quod predicta Ecclesia de Clifton, &c. vacavit per mortem prædicti Guliel. Walkenden prout, &c. unde petit judicium, &c.

Other averments.

Then the Averments in the second, that he remaines Bishop of Coventry and Lichfield; That he had no other Benefice with Cure at the time of the Dispensation, but South-keet. That Clifton is a Benefice with Cure, and that that Church is not defrauded of his dues, speaking nothing of South-keet, to which the Provision for the Cure did also extend.

That he never had more Benefices than two with Cure, since his dispensation; And that the yearly value of all his Benefices quæ jam retinet (Note: he says not, or ever had: so the condition might be broke before) exceeds not 1000 Marks.

Replication.

The Plaintiffe protestando, that Walkenden did not except Yelvertoft, Also that such Dispensations were not had at Rome for Bishops. King Henry the Eighth subjects, before that Act, Præpes Oyer of the Dispensation, Confirmation, and Presentation so called.

And then Demittes prout modo & formâ.

There was never judgement in Law passed upon this kinde of Commendam, though it hath heretofore received some onset; and therefore it stood with the gravity of the Court of Common-Pleas to adjourn it to the Exchequer-Chamber, as to the generall councill of Law, to receive here a definitive sentence. Ten Judges have already delivered their opinions what judgement they would advise to be given in the Common Pleas upon this case. Of which ten two, that is to say Baron Altham and the chiefe Baron, have holden the Commendam to be good in Law, and that the Commendatores Plea is good. And of the same opinion was Montague the Chief-Justice, that the Commendam was good, notwithstanding any exception; And that either upon the Stat. or by the Kings distinct act as consisting of it selfe. And that therefore judgement ought to be given for him, that is, for the Defendant. Two others, that is Justice Doderidge and Winch were of opinion that judgement ought to be given neither for the Plaintiffe, nor for the Defendant, but for the King, yet they condemn the Commendam as void in Law. The other six have also condemned the Commendam; but they have concluded that judgement ought to be given, for the Plaintiffe, and neither for the Defendant nor the King; And of the same opinion am I that judgement ought to be given for the Plaintiffe.

Now to the Case, which I divide into four main questions, whereof three are between the Plaintiffe and the Defendant. And the fourth is between the King, and both parties, Plaintiffe and Defendant.

The first main question.

The first question is, Whether this Commendam be good in Law upon the Statute of 25 H. 8. cap. 21. by which Statute it must stand or fall, being grounded upon it, and made in this form; that is to say, either by the Archbishop of Canterbury, or in Execution by the Dean and Chapter as this is, with the Kings ordinary confirmation appointed by that Act. And I hold that this Commendam thus considered, is void in Law.

The second main point.

The second question is, Whether the severall and distinct Acts of the King by his second Letters Patents (here called his Presentation) being more than

required by the said Act of 25 H. 8. upon consideration of all the parts of it, is not to an immediate Commendam made by the King himselfe, but to the standing of it selfe; as do so depend upon the former Commendam of the Demand Chapter; as if that fall, this must fall too. And in this I hold that it is not a p<sup>er</sup>petuarie or instantive grant; but is in it selfe and the Kings intention dependent upon the other, that it must stand or fall with it.

The third question is, Whether this Commendatorie be such a possession of the Benefice, as may by the Statute of 25 E. 3. cap. 7. be by the Common Law, interplead with the Patron Plaintiffe in the Quare Impedit, And in this I hold him not enabled.

The third main point.

The fourth main question is, Whether upon this whole Record judgement ought to be given, neither for the Plaintiffe, nor Defendant, but for the King, upon opinion that the Plaintiffe by demurring upon the plea of the Defendant, hath confessed the lapse of the Church, and the title of the King, as the Defendant Plea imports. And in this I hold, that upon the whole matter there is no warrant in Law to give judgement, or award a writ to the Bishop for the King in this case.

The fourth main question.

There is a fifth point that in this Case meets with a mans imagination; that is, how it stands with the Kings lapse, still being true, as it is pleaded; that is, whether it remains not still so to the King, as he was present aneto: as it is said be hath presented Over all the now Bishop of Coventry and Lichfield, who is instituted and inducted upon it. And whether the same Bishop shall not retain the Benefice, notwithstanding the judgement should be given in the plaintiffe; and a writ awarded to the Bishop for him.

But this question comes no way in judgement now, and what is worse, it comes in judgement before myselfe; and therefore hereafter: and therefore I will not prejudge any thing, but reserve my opinion in this point to the due time, and so proceed to the Case upon the Record.

Before I enter into the main of the Case, I will manage *visum sententia est* my long questions aliena, strange questions break into my Argument. Wherefore I will state the question single, that we may reason *ad idem*, which we shall never do if there be not an *idem* certain, for *multiplex indistinctum parit confusionem*, and Rogationes, Questiones, & Posiciones debent esse simplices. Therefore I will exclude variety either in matter or nomination.

And first I declare that the Kings immediate personall ordinary superiour power, which he exercises, as may execute *Authoritatem Regis supremæ Ecclesiasticæ*, as King and Sovereigne Governour of the Church of England, which is one of those powers, *quæ faciunt Coronam*, which makes the Royal Crown and Diadem in force and vertue, is not (as I shall hereafter shew) in question in this Case. But the question is onely of power given to the Archbishop, Demand Chapter by the Statute, and the true meaning of it, concerning licences and dispensations, which I call *Authoritatem ordinariam limitatam & delegatam*.

The word in the Statute is to Authorizd persons &c.

Secondly, we have nothing to doe with a Commendam retinere, which indeed is no Commendam, though it be so commonly called; but is only a faculty of Retention and Continuation of the Benefice in the same person and state wherein it was, notwithstanding something intervening, as a Bishoprick, or the like; which without such a faculty would have shopped it. And a Commendam is not, for my own Benefice cannot be commended unto me; Therefore no argument taken from allowance of a Commendam so called of that kinde, *sci*, to retain, can warrant this that we have in hand.

A third observation which amounteth to an exclusion also is, that this Commendam which we have in hand, is not Commenda perpetua (which can be no less than so; the life of the Commendatory absolute) which this is not; but so long as he shall live and remain also Bishop of Coventry and Lichfield.

The true question stated of the Commenda touching the King.

So then our single question singled, and stated, is, Whether a Commenda of the Tenour and forme that this is, having the clauses that this hath, and



ing some others which this wants, (as they appear in the Record, and as I shall observe and enforce them after distinctly in my Argument,) made by an Archbishop of Canterbury, or Dean and Chapter, (with the Kings ordinary Confirmation, according to the Statute) to a Bishop, to take Benefices de novo, to the value of two hundred Marks in the Tax of the Exchequer, with Cure or without, and to hold them and their fruits for a time limited, more than six months, and less than for life, be warranted by Stat. of 25 H. 8. and the true meaning of it.

*Commenda  
Quotuplex, &  
qualis.*

Commendamus are of three degrees, one semestris, another perpetua vel ad vitam, a third, intermedia or diuturna, sed limicata, which is called sometimes temporaria, or temporalis or ad certum temporis spatium limicata, as shall appear in the Canons after.

The Commenda semestris grow out of a naturall equitie, that in the time of the Patrons respite given him to present, the Church should not be without a Provisionall Pastor, which was a Law of necessity agreeable to the law of nature. And this might upon the same reason be continued with Revenues, so long as the Patrons respite lasted. as to six months after notice, in this case or the like. But after the lapse justly incurred the Commendamus to take, for then the Ordinary may Collate, for natura appetit perfectum, & Bonum necessarium, extra tetrantibus necessitatis non est Bonum. 18 Ed. 3. 21. & 1 Hen. 7. 21. the Bishop may sequester it the King present not: and 12 H. 8. 8. by Pollint the Bishop must see the Cure served, if the person falle, at his own costs. And Lindwood de jure-jurand. cap. Presbyt. verbum oblationis. If a Bishop celebrates Divine Service in any Parish of his Diocese, he may require the Offering at that day. And upon the same reason, if the Executors, being called by the Ordinary, will not provide the Will, the Ordinary may commit the Administration till he do it, 4 H. 7. 29. 10 H. 7. 18. and 7 E. 4. 12. Letters ad Colligend &c.

*Of Commendae  
of all sorts out  
of the Canons  
and the like.*

Now out of the Canon Law and Doctors, concerning Commendamus at all sorts, Concilium Chalcedonense sub Leone, Anno 451. cap. 13. Statuit Clericum in duarum Civitatum Ecclesiis, eodem tempore conscribi non oportere, Causa 27. questio 1. in principio cap. Clerici. Synodus 7 cap. 15. anno 789. sub Adriano in Concilio Niceno, secundum questio 1. in principio cap. Clericum prohibet in duabus Ecclesiis aliquem connumerari, negotiationis enim est, & turpis lucri proprium & ab Ecclesiastica consuetudine penitus alienum. Audivimus enim ex ipsa Dominica voce, quod nemo potest duobus Dominis servire, & hoc quidem in hac Civitate. Ceterum in villis quae foris sunt, propter inopiam hominum indulgeatur: Leo quartus Anno 487. causa 21, questio 1 cap. Qui plures: scribit, qui plures Ecclesias retinet, unam quidem titularum, aliam vero sub commendatione repetere debet, Et per la gloss. de Commenda non est praelatus, sed potius Procurator; & qui Commendavit revocare potest quando vult.

Note, that this makes Titulum, & Commendam, membra dividenda, and was but an evasion out of that good Law; except it be taken of the Semestris. Gregorius 9. Anno 1227. Nullus poterit plures Ecclesias parochiales oprire, nisi una pendeat ex altera; vel unam intitulatam, alteram vero commendatam habuerit, cap. Dud. 54. de Electione. Agains membra dividenda.

*Evidens mili-  
tas & vigens  
necessitas Eccle-  
sia semestris.*

Gregorius 10. in Concilio Lugdunensi generali Anno 1273. (marke how late it continues) Nemo deinceps parochialem Ecclesiam alicui, nisi in xate legitima & Sacerdotio contituito Commendare prsumat; nec talem etiam nisi unam, & hoc evidente necessitate, vel utilitate ipsius Ecclesiae suadente. Hujusmodi autem Commenda, ut prmittitur, rite factam declaramus ultra semestris temporis spatium non durare statuentes, quicquid secus de commendis Ecclesiarum parochialium actum fuerit esse irritum ipso jure. Cap. Nem. 15 de electione, in sexto. Note that this is the last, either generall Council, or popes Decree or Decretall, which gives leave to Commendamus.

In the glosse upon this it is said, that the consent of the Patron, & omnium qui ladi possunt, must be had, and that he is not Praelatus but Procurator, Administrator

liegt der Collationem, deus per temporalem

**Comments**  
**Synonyms:**

First no Judge  
had words  
before.

Port Street 2nd 501

it qui ad locum fun-

to 1000 ft.

[illegible][illegible]

mens deest amplissima dispositio: sic est verus & legitimus titulus, cuius signa sunt perpetuitas & fructuum dispositio: quae duo concurrunt in perpetua Commenda. Et potest lotare omnia bona Ecclesiarum & talia Commenda. Potest permutare, &c. Best inftar Collationis, & Reservatio Papae, &c. per Commendam reservamus sicut per Collationem; secus per temporalem.

Of the power  
of dispensing  
in general

For the King.

This no Judge  
had touch'd  
before.

The Pope.

And first I hold clear, That though this statute saies that all dispensations shall be granted in manner and form following, and not otherwise, that yet the King is not thereby restrained; but his power remains full and perfect as in law; and he may still grant them as a King; for all Acts of Justice and Grace both from him, as 4 Eliz. Dier. xi. The Commission of trial of Justice upon the Statute of 18 H. 8. cap. 13. is good though the Chancellor do not nominate the Commissioners, as that Statute appoints, and yet it is a Law of King and Bench, and 6 Eliz. Dier. xi. The same made, Subscribes without the Judges not withstanding the Statute of 25 E. 3. And Mich. 12 and 13 Eliz. Dier. 203. A be Office of King's Counsel, by the Queen, without the Bill of the Exchequer, it is good with a Non obstante, against the Statute of 25 H. 8. cap. 1. for this Statute and the like were made to put things in ordinary Law, and to take the Subjection of Justice, but not to take the Law of Justice.

Next, it is certaine, and clear, that notwithstanding the Pope did in this King's time; even then when he was in the greatest height and strength, and when indeed he was Dominus in his own right, and in his own right and justice, then at the first when he was but simple Bishop in Rome, so notwithstanding he did, was coram non iudice, and super non habens, and non potest. And this is clearly declared by the Statute of 28 H. 8. cap. 16. Sec. prima & secunda.

But where it hath been the common inference, that notwithstanding the Pope did declare, or used to do, the same should be by this Act of 25 H. 8. allowed to the Archbishop, and no restraint to be understood upon the Statute, to say how as the Pope did lawfully say, that, they say, were to frustrate the whole Act, because he did nothing lawfully. This must needs be a more perfect examination; for we must not leave it upon so bold and lawless a power, and so bad a construction: Quo Jure, quare injuria? Remember therefore the Popes Acts of all sorts formerly allowed, or established, as appears clearly by this Act itself, Sec. 1. which contains both his claims, and also it sells, under these words: That he claimed full power to dispense with all humane Lawes of all Realms, in all causes which be called spiritual. And the same Statute saies there Sec. 1. & 2. That it hath been so used & practised by many years, by the inference of the King and his Judges. The truth whereof appears by the Statutes of 25 E. 3. and 30 E. 1. recited in it, and this Statute 25 H. 8. Sec. 5. where it gives strength to the Act of the Archbishop, binds upon this: That they shall be of the same force that they should have been, if they had been obtained with all things requisite of the See of Rome. And Sec. 20. saying the Popes Dispensations then in force, gives them no other force than they had before this Act: which would make the whole Law inforce, if nothing were lawfull according to the supposition and intention of that Law.

So this Antinomie is to be reconciled feedere distinctionis thus: there is veritas vera, pura & realis, which is the primitive and very truth which answers the meet Right: And there is veritas verisimilis, putativa, practica, suppositiva, and ex concessis; As for example, If a suppositions Child be once acknowledged to; the true Child by him whom it concerns, the consequences which follow of it are as certain ex hypothesi, ex concessis, as if he were the true Child indeed. And therefore petitio principii, (if it be gotten) is Elenchorum fortissimi; So was it in this case when by the sufferance and ignorance of times, the Pope had gained the opinion & reputation of supreme head of the Church, and as Hanks 11 H. 4. 37. saies, Papa omnia potest; & Hill there 77 acknowledgeth him

Tully so doth  
distinguish of  
Justice.



Hue & grand Sovereign from whom all Ecclesiasticall persons have their power, and Tairming there calls him Apostle. It followe by consequence upon a like ground, that his Ecclesiasticall Acts must be allowed lawfull. As upon the clearing of the Kings Supremacie, when the clouds of ignorance were dispersed, the consequence of his anthority was as clearly declared 25 H. 8. sect. 2. And yet alwaies the Crown kept a possession of his naturall power of dispensation in spiritualibus 11 H. 4. 60. to retain Benefices with Bishoprick, and 11 H. 7. 12. double Benefices; and so it came to this, that Communis Error facit quasi jus; scilicet when it aros from the error and sufferance of State, and of Courts of Justice both, soz res judicata pro veritate habetur, though it be not so indeed. And therefore but in one case let me shew you the Act of the King and of the Court of Justice, concurring to allow an Act concerning spiritually done by the Pope, which is the 41 E. 3. 5. where the King sought a Quare Impedit against the Bishop of Sarum soz a probend in the Church of Sarum and said soz his title, that the said Bishop being Prebendarie thereof when he was Bishop, the Bishoprick avoided, and so the Temporalities being in the Kings hands, the Defendant being Prebendarie, was made Bishop, and so the Prebend avoided, and belonged to the King to present. The Defendant pleaded in Bar, that the Pope having reserved this Bishoprick to his collation, gave it to the Defendant; whereupon the King reciting the Popes gift withdrew him his Temporalities, after which he was consecrated, which Collation made the avoidance of his Prebend; At which time the Temporalities were out of the Kings hand, and in his hands; whereupon it was adjudged that the gift of this Prebend did belong to the Bishop, and not to the King.

The King.

Whereof note, That though the King might have given this Bishoprick by one of the Stat. 25 E. 3. by reason of the Popes said usurpation upon the Dean and Chapters Election, and also in default of the Election, as by common broken; whereupon they held the right of Election by the gift of the Crown, as the same Stat. 25 E. 3. also saies; yet that being not done, which was the temporall part; you see that he was both by the allowance of the King, and judgement of the Court holden a Bishop elect, de facto, by the Popes anthority only, or else the liberty of the Temporalities to him had been utterly lost.

Yet even in those times the King was not excluded, but still was acknowledged to have power of dispensation and other Ecclesiasticall Acts; And therefore at the first did give Bishopricks and Abbeyes, and after granted the Election to the Deane and Chapters and Covents, 6 E. 3. 11. and 11 H. 4. 68. and might grant dispensation to a Bishop Elect, to retain a Benefice, 11 H. 4. 60. and to take two Benefices, and to a beneficed to be a Priest, 11 H. 7. 12. So now we must agree that the Archbishop cannot doe all things that the Pope did de facto, soz he made a Provision upon all Churchmens Benefices de facto without their consent, as appears by the statute of 25 E. 3. but those the Lawes and Courts did still pronounce to be unjust and injurious. But the statute is to be understood of those things that the Pope was by the erroneous opinion of that time supposed to doe lawfully, scil. in meer spiritualis. And indeed a man may well say Non concessio of that which a man hath no power to grant, as well as if he made no grant. Now then the Archbishop is restrained to those Acts only that the Pope did de quasi jure, that is in spiritualibus only.

The King.

But now I proceed and affirme, that the Archbishop is restrained by the statute it selfe in foure maine heads and Cases which, were accounted spiritual, and put in dispensation every day by the Pope.

Fourre Cases  
wherein the  
Archbishop is  
restrained  
from Dispensation.

And the first is in sect. 3 & 12. That nothing be repugnant to the Lawe of Almighty God, neither soz King, nor subject. So no advantage soz prohibited marriages as Tanfield Lord chiefe Baron thought.

1.

Secondly, that nothing be against the Stat. of 21 H. 8. against pluralities of Benefices.

2.

That nothing be done against the Kings Prerogative or Lawes and Statutes

3.

Statutes of the Realm in generall, which is not in the Statute *totidem verbis* as the two other cases were, but is inferred plainly upon the disposition of those times, and upon this Law it selfe. For this Stat. sect. 21. banisheth all Licenses &c. made at Rome contrary to the Provisions of the Lawes and Statutes of the Realm, having in the sect. 20. next before established Licenses and Dispensations from Rome then in being generally; which shewes and makes the plain distinction: That the King never before, nor ever after this Statute, meant to allow Dispensations against the Common Lawes, howsoever the Pope had practised such sometimes. For the Dispositions of those times, I observe the Stat. 25 H. 8. cap. 14. sect. 1. which enbeighs against the proceedings in case of Heresie, by the Popes Canons, which are repugnant and contrary to the Prerogative Royall, and Lawes and Statutes of this Realm. And the Statute 25 H. 8. cap. 19. sect. 3. which banisheth all Canons provinciall in that kinde.

Fourthly, he is restrained sect. 3. in three places to cases, and matters that shall be convenient and necessarie upon examination of the causes and qualities of the persons; and sect. 12. speaking of a remedy, where the Archbishop shall refuse to grant Dispensations. By the authoritie of that Act, it is limited to such persons as ought of a good, just, and reasonable cause to have the same; wherein you shall see that I mean not any thing shall be re-examined that is committed to their examinations by this Law; as I shall hereafter shew when I shall have occasion to speake of that purpose. So I hold that an Archbishop cannot license a marriage within the degrees prohibited, as being against the Law of God. And yet the Pope did it, and doth it at this day elsewhere. I hold likewise, that he cannot dispense in some cases mist against the law of God, and the Lawes of the Realm also; as to dispense with an Alien that neither speaks nor understands English, to have a Benefice here, which yet was practised by the Pope, as appears by the Statute of Carlile 30 E. 1. recited in the Statute of Provisors 25 E. 3. which declaims against the Pope for giving spiritual promotions to his Cardinals, Italians, or the like; which never bin dwell, nor might dwell here: whereas it is of the essence of a Pastor to be didacticus, to teach the people in their own language, 1 Tim. 3. 2. Cor. 1. 14. and ought also to be Hospitalis, and so the said Statute of Carlile saith, That the Prelates and Churchmen of England were founded, to inform the people in the Law of God, and to keep Hospitalitie, and do Alms, and other works of Charity in the places where the Churches were founded.

I hold likewise, that the Archbishop could not by the meaning of this Law, appropriate a Benefice with Cure to a Pannerie, between 25 H. 8. and the dissolution of Monasteries, though the Pope made many *de facto*; for a woman cannot be a Pastor by the Law of God, 1 Cor. 14. 34. 1 Tim. 2. 11, 12. And Dier in Grimdons case says well, that it was a thing abominable. I say more, that it was against the Law of the Realm; for Beneficium non datur nisi propter officium, and it is no reple that the Cure may be served by a Curat for them; For the question is not, how they can make a Curate, but how themselves are capable: and therefore in 5 E. 3. 4. Brook Patents 108. 9 E. 4. 6. & 4. & 5. Ph. & Mar. Dier 150. If an Office of learning be given to a man utterly insufficient, it is utterly void; and though it be to him and his assigns, or to be exercised by his sufficient Deputis, it mends not the case; but it must radically vest in the first Grantee, before it can go in title of Procuration, or Deputation to any other.

Now it is well said in Grimdons Case, that proper and operative word that doth appropriate, is to make the Patron and his successors perpetual persons, which should here be the Prioresse, and her successors, which faile as I have said; for *jura natura sunt immutabilia*. But such and all other Appropriations howsoever defectible, were given to the King by the true meaning of the Lawes of Monasteries, which meant to give all, as well in reputation, as in truth; yet I agree with the book 12. and 13. Eliz. Dier. 292. B. That if a meer Layman, per,

as a man utterly illiterate be Presented, instituted; and inducted, that this is not a meer Nullitie; but he is a Parson de facto, so he hath all the Ceremonies to make him a Parson, and his insufficiency must receive examination; but the incapacity of a woman appears in it self. And though the Lay, and illiterate man be a Parson de facto; yet no Dispensation can make him a lawfull Parson not subject to deprivation, because it is malum in se: even as a man may get Land by disseisin de facto, but no license can make it lawfull.

But all these enormities in the time of the Popes transcendent and unquestiomed power stood firm; for what ordinary or Ecclesiasticall Judge durst question his Act who could not erre: and if any durst, the Pope had power to disallowe his proceedings three wayes, that is indeed by all; Anticipando by taking the cause to his own cognizance by prevention. Concurrento by joining some other with him that might over-rule him. And avocando, by taking the cause out of his hands, and so to make himself both partie, and Judge.

Having thus cleared my way, and made some generall observations upon the Statute, and also distinguished the kinds of Commenda; I will now examine this Commendam we have now in hand, not by the Lawes of Italy, or France, but by the Lawes of England, whether Common, or Canon-Law, by which it must be judged.

And first because the Lawes of the Realm doe admit nothing against the Law of God, I quit this Commenda, that I do not condemn it for any contrariety to the Law of God; for though it be de jure Divino, That Christians be provided of Christian offices and duties; as of Teaching, Administration of the Sacraments and the like, and of Pastors for that purpose; and therefore to debar them wholly of it, were expressly against the Law of God. Yet the distinction of Parishes, and the forme of furnishing of every Parish Church with his proper Curate, Rector or Pastor, by the way of presentation, institution, &c. As is used diversly in diverse Churches, and the sorts of Tithes which he hath, or is to have in his Church and Benefice, is not a positive Law of God in point of circumstance. And we know well that the Primitive Church in his greatest puritie, were but voluntary Congregations of believers, submitting themselves to the Apostles, and after to other Pastors, to whom they committed of their Temporal, as God did move them. So as Ecclesiasticus ap. 17. 17. saies, God appointed a Ruler over every people, when he divided Nations of the whole Earth. And therefore if a people will refuse all government, it were against the Law of God; and yet if a popular State will receive Monarchy it stands well with the Law of God.

But now to come to the main; I hold this Commendam to be void in Law, because it is contrary or rather Contrariant, Repugnant, Dissonant and Dissonant to the Lawes of the Realm, and the Analogs of them, for seven faults, or Reasons.

The first is this, that power is given by this Commenda to the Bishop De iure, propria Authoritate, to take Benefices with Cure, or without; and to enter and take possession of them, and to convert the profits of them to his own use without Institution, Collation, Induction, or other solemnities of Law whatsoever: no restraint or provision being made, that the Benefices that he shall take, shall be void, when he shall take, enter, and possess them; as it ought to be.

Secondly, it is not provided in the Commendam, that the allowance and consent of the Patron be had and gotten, before he execute the Commendam, as it ought to be.

Thirdly, the Commenda temporary, more then for six moneths, and lesse; Fault, for life, cannot stand with the Rules of the Common-Law of the Realm.

Fourthly, he that hath a Benefice in his gift by lapse, is lesse able to make such a Commendam of it then he that hath the Advowson in his proper interest.

Fifthly, I adde a Corollarie or Appendix, rising out of all these exceptions, which I may call Argumentum ab Authoritate negativa; that there was never

This Commendam not against the Law of God.

A person, or a people hereticall may by just Authority be excommunicated or indicted.

This Commendam void, for seven faults.

1 Fault.

2 Fault.

3 Fault.

4 Fault.

5 Fault.

Commendam



Commendam of this form or nature, heard of in any book of Law, or Record, before the Statute of 25 H. 8. or ever any such hath received any allowance by any judgement, or iudiciall opinion; but hath rather, whenthey have come in question, been disallowed and condemned.

6 Fault,

Worthly, this Commendam is void by the Statute of 21 H. 8. Pluralities, because it contains not it self within the number of Benefices allowed by that Law.

7 Fault,

If there were no Statute nor Law at all against Pluralities, yet this Commendam giving power to take Benefices of any sort or number, so the value exceed not 200. Marks, is not warranted by the Statute of 25 H. 8. as being neither necessary nor convenient, but clean contrary; and yet I will leave them the latitude of their discretion allowed them by the Statute.

The first reason of the first great point.

As the first, a Patron cannot present to a Church full, neither can a Commendam be made to a Church certain that is then full; for there is no difference betwixt a Commendam, and a Presentation, but that the one Presents the Parson to the Church, the other commits the Church to the Parson, both being incompatible when the Church hath his proper Rector, or husband already; and therefore cannot be married, or bespoken to another. And the Canons when they speak of Commendams, rely upon Ecclesias vacantes, and necessitas & utilitas Ecclesie vacantis, as before.

Suppose the Commendam had said that he might take and enter, Ecclesias vacantes, vel non vacantes: this is in effect the same. For it is generally, Beneficia cuiusunque nominis, qualitatis, &c. So that if he enter a full Church, one cannot say that he hath exceeded his license, but the license it self hath exceeded.

And note also, that the Commendams were not in ancient times made in terms generall, as this is, to any Churches uncertain, but to some certain Church then void; as appears both by the Verbs of the Canons, and the titles of the two famous Presidents before remembered, Fandensis, and Lisiensis.

This absurditie can receive but two answers.

First, that the Commendam is to receive, civilem intellectum, of Churches void only, though it be generall.

The other, that this Church of Clifton was void, when it was taken; and so no intrusion.

As the first I reply, That the papacy was a meer and plenary tyranny, especially towards Churchmen, and in Church causes. Now a full tyranny hath two parts, the one sine iure usurpare; the other, inordinate imperare.

And so the Statute of 28 H. 8. cap. 10. proves; for the Statute calls it an usurped tyranny, and the exercise of it a Robbery, and spoiling of the King, and his people. And this Statute 25 H. 8. sect. 14. calls it ruine and spoil of the Realm; so you see both parts have tyranny in it.

Now it is plain, that he had no more right upon the Abbotsons of Churchmen, then of lay-men; and therefore they had the same remedy against his prohibitions by Quare Impedit, in the Kings Courts that Lay men had, if they durst have used it; as appears by the 11 H. 4. 76. and the Statute of 25 E. 3. of prohibitions; but because they were in his danger in meer spiritualls, subject to deprivation, deposition, and the like; and to receive promotions by him, he wrought his will upon them, oblique in temporalibus, which was the cause that the said Statute 25 Edw. 3. gave their Presentations to the King, when the Pope usurped upon them, as to a Fortification against invasion.

And that the Pope did use to provide two Benefices full; see two expresse Statutes 7 H. 4. cap. 8. & 3 H. 5. cap. 4. Rastall, Provisions 20. & 21. And that a civil understanding will not help; see Grimmons case judged in the point; That if an Appropriation be made of a Church then full it is utterly void; except it be made by expresse words, de futuro quando vacaverit, which is the clause wanting here.

So Pasche, 9. Eliz. Dier 259. 9 Edw. 4. 6. 3 H. 7. 16. the office of Steward

of

of Courts being full, cannot be granted to any other, but by the King. And that  
 not by present words, but by words *de futuro, quando vacaverit*.

Now to the second answer, that this Church of Clifton was held, both when  
 the Commendation was granted and executed; I reply, that this answer had  
 no good effect the Commendation had been of that Church certain, as the Kings  
 presentation is in the case. But the Commendation is of any Churches general-  
 ly, it gives power to execute upon any hold, or not hold, which is against  
 the nature of a Commendation; so the fault I find, is not in the execution of the  
 Commendation, but the constitution of it; which being not warranted by the  
 power of a Commendation, makes it no Commendation at all, and then it can bear  
 no execution at all; *forque natura sunt incompatibilia*, which extends to particular  
 orders and forms of every thing, *que dant esse*; for if you change the essenti-  
 al parts, it may be some other thing, but it is not now the same that it was.  
*Quia forma perquam quaque res in propria specie constituitur, perfectio, qua-  
 ratione est: Perfectum est, cui nihil deest, secundum suam perfectionis, vel nature  
 modum.*

Now to show that a good execution will not profit where the constitution  
 is defective; See Mildmayes case 24 Eliz. in Coke lib. 1. 175. Sharrington  
 gave power to himself to limit uses to any body; This limitation in general  
 singularly void, he could not limit any use to his Daughter, So 33. Eliz.  
 Coke lib. 1. 154. The Lord Paget in consideration of payment of debts, con-  
 veyed to stand charged to the use of Charles Paget for years, though he made him  
 executor after, yet the limitation is void.

Vernons Case, Coke lib. 4. 2. If A. make a Feoffment to the use of a stranger  
 to live, the remainder to his wife for her jointure; though the stranger dye  
 before the husband, yet this will not be made a jointure, *quia in modum* & *ad finem*  
*non dicitur de feoffmentis, sed de communibus; Quia, and Franch. Case,*  
*where Richard of A. and in Fre. Richard his son and Heir served for A. as to be-  
 lieve after his death, yielding a Rent to his son & Heir. He died; his son proved  
 his Heir, and yet the reversion was adjudged void.*

Now to the second part of the Commendation. That there is no prohibition  
 that the Patron consent be had, which is necessary, as that the Gloss up-  
 on the Council of Lyons, and upon Othobonds Prohibition is *secundum omnes  
 patrum Consensus & omniumque Christi possunt requirunt*. As if the Patronage  
 is divided, as A. to name to B. and B. to present, other as the books are 1. 14  
 A. had other Common looks. And again, *Quod latet observant Prelati,  
 quia presentati per patronos, non faciunt Commendam*. And 1. 14. 76.  
 Ioke, and Hoc. The Pope may grant that a man may have others Bishops  
 with consent of the Patron. So it seems that in case of Commendation, the Par-  
 son first presented by the Patron to the Bishop, which was indeed the  
 naturall course, the Patron being the first ago, and the Commendation made  
 by the effect of an Amotion, Institution, and Induction. Now this  
 instrument of Commendation both expressly exclude the Patron in these words,  
*Auctoritate sua propria capere, & apprehendere absque institutione, Collatione,  
 inductione; et in hac quacunque juris solemnitate, &c.* which (as I) must refer  
 to the presentation to exclude that, because the spiritual solemnities were na-  
 med, and excluded before specially; *Solenne est quod solet fieri*, Aug.

The second  
 reason upon  
 the first great  
 point.

Now if the Commendation had been, that he might take the Benefices without  
 the Patrons consent; it had been void; this is the same in effect in closer words;  
 Yet know the degrees of the Popes practise in Commendations, by Rebuscus  
 de practi, &c.

The Pope provided upon the Churches of the Clergy absolutely upon the  
 Churches of the Lay Patrons; his prohibition was not good, but either with an  
 expresse clause, *Dummodo consensus Patronorum, Licetorum, adhibeatur*; or  
 without expresse, *Non obstante*; the Patrons consent were not had.

So by their own rules, the instrument of Commendation itself must provide  
 for the consent, as the discharge of it; so the Pope said that the Patron was to

be

But if a Commendam were made to the Patron himself, it were good in this form, as an Appropriation which is alien to the Patron.

Now that the Patrons right was never subject to the Churchmen nor Ecclesie Ecclesiasticall, and that it is the more worthy and first. As you part of the promotion to the Benefice, is apparent in all dispositions and transpositions of Benefices, as in the former Presentation in the Appropriation, the rotation of Churches, 50 Edw. 3. 27. 14 Hen. 6. 15. In deriving of a Vicarage, 10 Edw. 3. 51. 15 Edw. 2 Fitz. Quare Impedit, 164. In translating of a Parochial Church to a Collegiate, 50 Edw. 3. 16. In permutation and change of Benefices, 45 Edw. 3. F. Exchange 10. For the Patrons must present *ex novo*, and did so there. But it is true, that it shall depend upon the creation and enjoying of the Exchange, as that case is in both points; and the Reservation and presentation of both the Incumbents, Register 306. B. 14. In which case, if the reason of his change fail; either Incumbent shall returne to his old Benefice, in *pristino statu*, upon his former Presentation.

The patronage is both granted, and pleaded by the name of liberis dispositionibus Ecclesie; 14 Edw. 2. 3. & 7 Edw. 3. 4. by the name of the Church it self; *Quia the Quare Impedit is, quod permittit presentari in Ecclesiis; hoc quod nec & ad suum spectat donationem.* And truly, the Law of the Ordinary, are to be confined to it: as the maintenance of a Church-holder upon such matter.

The Patrons' Movement takes place against the Dobbins, after death incurred, 13 Ed. 4. 3. 43 Ed. 3. 11. 13 Hen. 4. 8. and against the Kings in 1400.

Trim. 7 Eliz. Dier 545. Cafe Watson, Quare Impedit, against the Bishop and his Incumbent upon default; the Plaintiff chose Xlty, and had a Writ to the Sheriff, where it was found that the Church remained void therefore, so the Ruple returned to the Crown, and was full of the Solicitor with Archbishop, and the Plaintiff had judgement of damages, satisfaction, &c. this year, because he should remove the Clerk, and a Writ to the Bishop, now as it is not fully within the rule, nullum tempus occurrit Regi; for the Plaintiff continues till the Ruple operates, so the Bishop time do not lose to him peremptory, as in other Xlties.

The Act of the Synod may disappoint the Church, but if the Patron appropriates (which is Patron) present, it did disappoint, 38 H. 6. m. 1. H. 6. 18. Fitz. Na. br. 35. And I am of opinion, that if he present and his Clerk be refused for just cause and notice given, that lapse shall incur; for the appropriation gives him a right to hold, or not. As appears by the form of an Appropriation in Grimdon's Case, which by his presentment he had committed. And since the Patron's right and part to the filling of the Church, and making an Incumbent, is prior tempore, & prior jure, since both in time and dignity it is Act. Shall the Ordinaries be good to pervert and twist the Act, which the Patron ought to begin to him; to give the Incumbent leave, to leave the door, and come in by the window?

Now what answer hath been made to this? Nothing, but that the King who  
proved Patron, did consent before the Commissioners arrived, which is not ad  
idem (as we have said before) with the spirit of the Constitution, to answer us  
to the Executive. And the Pope's practice was in this exact, as you see in  
Rebuffus before, though he took upon him more in the Patronage, than belon-  
ged to him.

Suppose that the Archbishop should commend to a certain Church, bell, licet patronus non consentiat; and so in the general this is; the instrument of Commendation were both, though the Patron would after consent.

The third fault of the Commendam is, that it is temporary, which brings with it so many inconveniences, disorders and absurdities in law, as cannot be born; so the Church is neither altogether void, as it remains in the case of a Commendam Semelivis, which is but a requestration of truth and

The third reason upon the first great point.



Cares till the Patron present; neither is the Church absolutely full; for then it should be, as it appeares by the pleading, plena & consuta, that is, plena de possessoribus, & consuta de rectore: Now plenum est, cui nihil addi potest secundum modum sue capacitatis; Now that clearly is not so in this case; for he hath not the Benefice entirely, neither in Pastoral cure; for there is no more but a provision put upon him (not to serve the cure himselfe, as the Law speaks to the true Parson, Accipe curam tuam) but that the Church be not defrauded. Neither hath he the Benefice wholly in him, as a Rector, so as he may be said to be seized in Fee, or be said a Successor or a Predecessor to the Parsons that were before, or that shall follow. And a Benefice is so intire and indivisible, that it cannot be presented or commended by parts as the Cure, without the tithes, nor the fruits without the Cure, nor the Glebe to one, and the Tithes to another, or the like: And by the same reason the state and perpetuity of the Incumbent cannot be divided or diminished, as that he may take and hold it for three or four years, or as this is, so long as he shall remain Bishop. Again, he were to keep a freehold in a perpetuall Apeance, which the Law doth permit out of necessity, as upon death of Bishop or Parson, or the like, but never allows it to the Act of the party; and therefore if a man make a Lease for years, the Rem. to the right heires of I. S. I. S. being alive, the Rem. is utterly void. This Commendatory cannot have a Juris utrum, which is utrum sit libera Eleemosyna pertinens Ecclesie sue; for the Church is not his, he cannot take to him and his Successors; he cannot sue, or be sued in a Writ of Annuit, or the like. It ought to be vinculum conjugale, between the Rector and the Church. Now this is, as if a man should take a wife, with provision to keep it till he can get a richer: see the Gloesse upon the President before cited, of Ecclesia filialina, which holds, that the Pope may make an Institution to a Benefice for a time onely. Out of which observe the fallibility of foreign Authorities, and foreign practise; for by the Lawes of England, the Acts of Presentation, Institution, and Induction, are all authorities given by Law, and must be executed according to the form prescribed by Law, and cannot be modified: for Actus legitimi non recipiunt modum; for the Law gives the Church, to the Patron and Ordinary, who are but ceremonious Ministers, and are appointed their manner and form, which they may neither exceed nor abridge. No man may assigne Rent for Dowry, out of the land Dowable, without Dues; But it must be for no less estate then for life, 7 H. 6. 34. 33 H. 6. 2. where is interest and authority joined. Nay, a Jointure, which is but an imitation of Dowry, or a Bastard Dowry, cannot be made for the life of a wife, Coke lib. 4. 3. Moile 29 H. 6. 40. holds a Protection to be void, if it be for less than a whole year, M. 8 E. 6. Dic. 76 in case of Quarantine, the wife must not depart from the house upon her husbands death, and return when he will for the rest of her dayes. If the King grant the Office of Castles Rotulorum, or Chiefe Justice to two, it is void 18 E. 4. 7. I cannot grant the Offices of my gift as chiefe Justice, for less time than for life, if the King grant the custody of the land of a Languaque, absque compoco, it is void, 28 H. 8. Dic. 66.

But a Commenda perpetua may be admitted; for it amounts to a Collation or provision, and hath full words that he may take and receive a Benefice, viz. or the gift or presentation of the Patron, and enter into it without Institution &c. and take the profits as Rector in Commendam for fear of his

Now if it is true, that it is in a sort repugnant that a man should be a perpetually irrecovertible in a thing that he takes only to keep; for so was the original of a Commendam. But here where the words are ample, to make a full Incumbent, the word Commendam baffles in, may be counted void; as in the word Cure it is forbidden, the perfect word to make an Appropriation, is to make him Parson, or yet a perpetual equivalent, like unto this, will serve.

Now what hath been the main answer unto this; That the nature of a Commendam is to be determinable, and not perpetuall?

To which I make a double reply.

First, That the Commenda may be perpetua, and that is the best and perfectest kinde, as appears before by Canons and Doctors. But suppose that were so, I say the Popes chaire is no Court of Parliament to make lawes for Inheri- tances or Free-holds in England; neither is it in any mans power to create new natures in Law, according to new inventions, except they may stand with Jus commune, which is natura universa to, this purpose. Therefore in the like Case, in matter of manners, Tully gives good advice, Contra naturam univer- sam nihil contendamus, cā tamen conservatā propriam sequamur: was it not so in our Case of Perpetuities? every man made new Lawes for his proper patrimony, and they stood long in vulgar opinion, not without the assistance of learned men; but now explosa est sententia, being contrary to the Lawes; for politica legibus, non leges politiciis adaptanda.

The fourth fault of this Commendam is, that it is grounded upon a Lapse, (wherein is to be considered the nature of a Lapse,) which is not an interest naturally, as is the Patronage, but a meer trust in Law.

If the fifth moneth be incurred, yet the Patrons Clerk shall be received, if he be presented before the Church be filled by the Lapse, 13 E. 4. 3. Hook Plenary, 15. 43 E. 3. 11. 11 H. 4. 80. Observe 7 Eliz. Dier 241 for it seems by that case that the Patron should present against the Kings Lapse, for he hath damage but for halfe a yeare.

*Nullum tempus  
etc. binds not  
because the  
King is in his  
actuall pre-  
sentment a-  
gainst the  
Patron.*

A Lapse cannot be granted other as a Grant of the next Lapse of such a Church neither before it fall, nor after. If the Lapse incur, and then the Ordinary be the ing shal present, and not the Executors of the Ordinary: for it is rather an ad- ministracion than an interest. Fitz. Nat. Br. 34 G. 25 E. 3. 24 Dier 87. is doubt- full, whether to the King, or to the Metropolitan. And I hold it clear, that if the Patron present, and his Clerk be instituted, and remaine without Induction eighteen moneths, the King shall not present upon him by Lapse, as he may do upon a direct Patronage accruing to him by guard of temporalities, or of his Tenants heires after Institution before Induction. Fitz. N. B. 34. 36 K. for the King cannot have a Lapse, but where the Ordinary might have had it before.

But a lapse (as I have said) is an Act and Office of trust reposed by Law in the Ordinary, Metropolitan; and lastly, in the King. (who is *ecclesiarum & stabilimentum iusticie*;) the end of which trust is to provide the Church of a Rector, in default of the Patron; and yet as for him, and to his behoof. And therefore as he cannot transfer his trust to another; so cannot he direct the thing wherewith he is trusted to any other purpose: and therefore though the King or Bishop may suffer the Church to stand void (which yet is culpa) yet they cannot bind themselves, that they will not fill the Church; for that were injuria & malum in se, and therefore shall be judged in Law, in default of the King, for eadem mens presumitur Regis, quæ est Juris, & quæ esse debet, presentem indubium.

Now the Ordinary, or he that is to present by lapse, is as it were Negotiorum gestor, or a kinde of Attourney made by Law, to doe that for the Patron, which it is supposed he would do himselfe, if there were not some let. And therefore the collation by lapse is in right of the Patron, and so his turn, 14 E. 3. 26. And he shall lay it as his possession, for an assize of darrein presentment: 5 H. 7. 43. F. N. B. 31. F. The like if it were by Provision of the Pope 7 E. 3. Fitzh. Assize darrein presentment. 2. And upon 17 Edw. 1. 3. 69. If my Attourney to present five Benefices, should consent or agree to such a presentment as this, it would be hold, as out of his warrant; these kinde of Provision- strations for others are never extended beyond Ordinaries.

Barliffs may receive Rents of old Tenants, they cannot accept new ones change of tenants; they cannot tender for non payment of Rent, much more in case of procurations made by Law; the reason is, they are but a professional ministerie,

gintierie, for ease of necessity, and certain benefit of the Lord.

The estates and persons of Ideots and Lunatiques are by Law intrusted to the King; if therefore, the King should grant to one that intrudeth upon the possessions of an Ideot or Lunatique, or takes their persons unlawfully, that he would not meddle with them, but suffer them to doe their pleasure, these grants were void. For these are Acts of justice, and offices of a King, which he cannot put off: Cessa Regnare si non vis Judicare. And in these things the King is never supposed by Law ill affected, but abused and deceived; for, Eadem personatur mens Regis, quæ est juris: So the 7 H. 4. 42 B. & 21 E. 3. 47. the Earl of Kents case, if the King being but Guardian, grants the Land in Fee the grant is void. So we judged lately; If a Sheriffe make an Under Sheriffe, and take Bond of him, that he should not serve Executions without his consent, the Bond would be void; so it is resolved Co. lib. 7. 36. that the King cannot give away small Law: So here, if the King having a lapse, should grant to an Intruder, that he would not present to the Church, yea, or perhaps, if one should sleep upon the Kings lapse, and the King should grant to the usurper that he would not remove his Clerk; for this were a breach of that trust which the Law repositeth in him, as well for the behoof of the true Patron, as for the good of the Church; for by this means the Patron should lose his Patronage.

The fifth exception, or rather Argument, out of all the former exceptions is Appender, or Collator after them all, I say, a praxi beneficiorum in Anglia, as Rebuffus writes, de praxi beneficiorum in Francia. For by the Law no practise of this Realm, we must judge here; not by the practise of foreign Nations, much lesse by the practise of Rome, the Popes temporall Principallitie a member of the Church, which they call patria obedientie, but we may well call patria jugo assueta or servituti subjugata. And besides we know not the constitution of their Patronage, and Church-livings in foreign Kingdomes. But this I say, that no man shall shew me booke of Law, Statute, Authentick relation, or judicall opinion, no how history, nor Chronicle, that did ever allow in this Realm, a Commendam in the Capere, or apprehendere, and to hold populi Authoritate, for a time lesse then for life, either from the Pope, or any other; but such opinion as hath been, hath been against it; neither shall any man shew me the word Commenda, in booke of Law or Statute of England, where as H. 8. only 11 H. 4. 76. Thirning and Hankeford agree, that the Pope may grant to a Bishop to take Benefices de Novo; And likewise Horton, and Hankeford there, that one may be made Bishop of divers Sees by the Pope, if the Patron assent; which I grant, understanding Benefices totally, with consent of Patron, and free from the exceptions that I have, and shall take against it.

In the case of the new Booke of Entries, fol. 521. Pas. 43 Eliz. Rot. 1028. by the Queen, against the Bishop of Coventry, and Crompton, Warburton, and Angell, Judges, argued openly; and at large against the Commendam for the Queen; and Anderson also declared his opinion so. But Walmisly declared his opinion to the contrary, without Argument. Whereupon, the Queens Attorneys entered a Nolle prosequi.

Now it is to be observed, that all the inventions of the Pope concerning disposition of Benefices, Bishopricks, and other Church-livings in England, were still to make perfect, not mutilate Incumbents. As Appropriations, Collations, Provisions, Commenda retinere, as it is called, and Reservations, which was not of it selfe a bestowing of a Benefice; but was onely a declaration what dignities or Benefices he did reserve to be disposed by himself, and no other: Whereupon afterwards was to follow another Act of Provision, or Collation to give it execution. And this he would make sometimes by particular Benefices, sometimes by whole Provinces, and Kingdomes, as appears being in the Extrabagants of Clement the 5. And the Stat. 25 E. 3. of Provisions. Now that Provision did make a perfect Incumbent perpetuall, as well as the Ordinary sojm of Institution, &c. See Fiez. Na. br. 37 C. 18 Ed. 3. 23. 41

The fifth reason upon the first great point.

Provision made a true Incumbent though in a manner extraordinary. This Commenda hath neither matter nor forme.



Ed. 3. 5. & Stat. 13 R. 2. Rastall Provisions is made against Provisions to come; yet enacted that such as were in possession already by Provisions, should enjoy them during their lives. Against all these practices of the Pope of Collations, provisions and reservations the Statute of Provisions did testify: Was the State so imprudent as not as well to forbid those Commendams being more mischievous if they had been then known or allowed by practice here or was the Pope so gentle as not to have used this device to leape out of the lutes of Provisions, if it would have prevailed here as he used it in other countries to defeat the Canons against pluralities, and as he did use in this Kingdome the Commendam retinere, because it was not of the words and meaning of the Law, in that there was neither avoidance of the benefice nor intermeddling with the Patronage?

The next mention that is made of the word Commenda in books of Law is 27 H. 8. where the Archbishop is said to be Commendatorius Sancti Albani, which might either be in the Retinere, or else by an absolute taking. It be next in the Statute of 28 H. 8. cap. 16. where the Statute making mention of diverse kinds of Bales and Bishops of the Popes, nameth (inter alia) Commendams and Exalties; and enacts that the party shall enjoy the benefit of such of them only, as might be granted by the Archbishop, by the Statute 25 H. 8. So this is still under the question, and argues, that all was not permitted to the Archbishop, that the Pope took upon him, which was plainly true in Exalties, by the Statute of 21 H. 8. and this Statute of 25 H. 8. But the Commendam in the retinere, may be made temporary for years, or any time whereof the difference is manifest, if their nature and reason be observed.

The difference between Retinere and Capere, is no lesse than between holding and detaining that which is already mine owne. (which is true from all the exceptions before taken to the other kinds,) and the taking of that which is another mans; and therefore take the Case, that I am already Beneficed by Promotion &c. in ordinary forme, and I would take also a Bishoprick, which of his owne nature would avoid the Benefice, wherefore I obtaine a dispensation, that I may hold this Benefice for three years; though I take the Bishoprick, which then I take; I remain the same Person still of the same Benefice, in no lesse estate then I had before, and here is no injury done neither to Church nor Patron; for though it be damnum, yet it is abique injuria. Now when three years are past, the Benefice holds, as it should have done at the first, if there had been no dispensation; like unto Fee-simple warranted for life, though the warrant be temporary, yet the thing warranted, and so to be recovered, is vaine to perpetuall; for it is a warranty of a Fee, though not a warranty in Fee. So the Commendam retinere &c. is of a perpetuity, though it self be not perpetuall. And of the allowance of this in Books, see the famous Case of An. 11 H. 4. 76. upon the Common Law and Statute provisions both Fitz. N. b. 36 & Jo. Parkhurst's Case, M. 6. & 7 Eliz. Dier 233. And Hollands Case. Colib. fo. 75.

Now though the Statute seemes to give power over all Dispensations granted at Rome, inserted and uninserted, and all dispensations generally; yet it must have construction, such as were allowable and allowed by the law and practice of this Realm, for else it should make our yoke heavier than before. And the Statute meant not to create new powers unlimited, but to translate from the Pope to the Archbishop, with restrictions, as was observed before. Now though the Pope did sometimes attempt to grant dispensations against the Lawes of the Realm, and perhaps added solemnations; yet they were but bruta fulmina and minæ inermes, and Idola concessorum. For they were no grants indeed that have no force, and therefore against the Kings grant you may plead non concessit, if it were not his, to grant. Co. lib. 6. 15. And therefore the Defendant here hath aburred, that the like Commendams were granted to the Bishops of this Realm, before the Statute which the Plaintiffe saith by protestation denieth. But the aburrment is vaine, if the Law judge the contrary, as is his protestation also that this Commendam is not against the Statute 21 H. 8. of pluralities.

The

The first fault that I assigne in this Commenda is, that it is against the Statute of 21 H. 8. of pluralities touching which and the provision of this Statute 25 H. 8. cap. 21. to preserve it, I will explain my selfe the more largely, because we are now upon a point that may utterly defeat that Statute, which was a most religious and politick Church Law, and I may be almost a Redintegration of those holy ancient Canons, and a re-formation of the Church, ruined by the Popes Tot-quots, dispensations and alterations; for though this be in the Case of Bishops which can be but rare, yet like dispensations may be granted to any common Church-man to take in Commendam ten Benefices to hold for years; or so long as he shall hold another Benefice whereof he is perfect Incumbent. For observe, the scope of this Law was to appropriate to every Flock his proper Pastor, both in body and mind; to help that he should be the Husband of one wife; una Ecclesia, unius Rectoris. In mind, that having but one Benefice, (saving some speciall favour and Considerations) he should not farme, graze, nor mingle himselfe with secular affairs, that might withdraw his mind. The policy of this Law I observe in this, that the time now at this Parliament inclining against the Pope, (for 21 H. 8. that Parliament that continued 25 H. 8.) yet they did not straightway take away from the Pope the power of dispensing pluralities, (which was one of the greatest enervations of his power, and was pellis introitus of his coffers) but they provided that his dispensation should not be sufficient of it selfe; but must only second a qualification, which should come from Lords and great men, whereby the King did draw them to his part from the Pope, by obtaining his power in this among them.

The sixth reason upon the first great point.

Now touching this Statute, I agree clearly, that Bishopsicks with-  
the Law under the word (Benefices) is that if a Parson take a Bishoprick, he holds not the Benefice by force of this Law, but by the ancient Common Law, as it is holden, 11 H. 4. 60. but I hold it is as clear, that if a Bishop take two Benefices, Parsonages, or Vicarages, with Cure either by Resignation, or otherwise de novo, he is directly as to those Benefices without the Law; for he is to all purposes for those not a Bishop (whether it be in his own Diocese or not) but a Parson or Vicar; and by that name must live, and be paid, and prescribe and claime; for the words are plain. If any Parson have-  
ing one Benefice with Cure et. take another et. whosoever will hold two Bene-  
fices, must have both such a qualification, and such a dispensation as the Law  
11 H. 8. requires. And thereupon I am of opinion clear, that if a man be qualifi-  
ed Chaplain to any subject, and then be made a Bishop, his qualification is  
void; so as he cannot take two Benefices de novo after by force of that qualifi-  
cation, but if he have lawfully two Benefices before his Bishoprick, he may by  
dispensation of resigner (besides his former dispensation, to take two Benefices)  
take them with his Bishoprick. And if a man, being the Kings Chaplain, take  
a Bishoprick, I hold that he ceaseth to be the Kings Chaplain; and Bishops  
are not in that respect Chaplains to the King, within the meaning of this Law.  
be that the clause of the Statute that gives the King power to give as many  
Benefices as he will of his own gift to his Chaplain, will not serve them.

Now where it was objected, that this Commendatorie is not within the Sta-  
tute of 21 H. 8. for two reasons, first because being but temporary, he neither  
is, nor can be inducted, which the Law requires. The second, that Clifton was  
the latter Benefice received; and therefore it should be Southfleet, and not Clif-  
ton that should avoid.

I answer to the first; That it is the office of Judges to advance Laws  
made for Religion, according to their end, though the words be short, and an-  
tiquated, Magdalen Colledge Case. Otherwise if a man take twenty Benefices,  
and enter and take the profits of them all, but take no formall instrument  
of induction, he shall be out of the Law, Durus est hic sermo; and so that Sta-  
tute sect. 4. it hath only these words really instituted or possessed; and hath  
not the word of induction. And sect. 25. it is provided, that a Benefice  
Appropiate

Appropriate shall not be taken a Benefice with Cure within the Law, else it had been; yet it hath no formal induction, but it gives possession without induction, and so doth this.

Coke lib. 4. 79. But another clear answer is, that the main scope of this Law is to avoid and disable all Licenses, Dispensations, Unions, Tolerations, and other faculties whatsoever from Rome, or elsewhere; whereby any should be enabled to take, receive, or have any more number of Benefices, or in other form than is prescribed by that Act. Now as it is judged in Digbies Case, a Benefice is taken, received, and had by institution only; and therefore a qualification, or dispensation following comes too late.

Why then observe the consequence; if a man having one Benefice with Cure by institution only, accept another by institution only, without dispensation; the Common-Law makes avoidance Actual if the Patron will. Now if this Dispensation to take Benefices without number be utterly void by the Law, then are these Benefices taken without Dispensation, and so void, especially being by a Bishop. And I hold, if a man take a Triallie which is not allowed him, he cannot by that take two Benefices, because his Dispensation is void.

Also I am of opinion, that if a man have a Benefice with Cure worth above eight pound, he cannot without qualification and dispensation procure another with Cure, to be united to it after though they make but one Benefice; for this countell of union is provided for, by expresse name. But of unions before, I am of another mind, and tolerations are also excluded, which is a proper word for this case of Commendam temporary; for it is not allowed, but tolerated, non precepto, sed in officio, as the Canon speaks.

1. He hath spoken thus much of the Statute of 21 H. 8. now observe how jealous this Statute of 25 H. 8 is, that nothing be done by it, to the prejudice of the other; and therefore the proviso for the preservation of it, is incut with a triplication; and as Solomon saith, Funiculus triplex non facile rumpitur. This Act shall not extend to repeal, or derogate, &c.

2. For to give licence to take, receive, or have any more number of Benefices, &c.

3. That the Act of 21. H. 8. shall stand good in all intents, according to the true meaning, &c. Now this Commendam crosseth all these points; and namely, it gives power to take, and receive (which are the very words of the Statute) without respect of time, more, or lesse, one, or more Benefices with Cure, and the same to enter and take, and have the profits, &c.

This also gives answer to the second objection, that Clifton should not hold; for I hold (as I have said) that a Bishop by Dispensation, may retain as many Benefices as he had lawfully before, but can take none of new, (if he had his number before) for the words are aswell against having of Benefices, as taking. And if he had none before, then he can take but one de novo, except by qualification he can be a Chaplain, and also by a double Dispensation have licence to take two Benefices, and hold them with a Bishoprick.

The seventh reason upon the first great point.

The last and seventh fault that I assign in this Commendam, is, that though there be a latitude of discretion left to the Archbishop, yet he is circumscribed with these cautions, sect. 3. That the Dispensations be necessary and convenient in the case of the King himself; and the same section hath these words, which in cases of necessity may lawfully be granted: and sect. 12. speaking of the refusal of the Archbishop to grant Dispensations, It is added, that of a good, just and reasonable cause ought to have the same; for it is not discretion, cum ratione insane.

The Stat. sect. 3. gives the Archbishop the examination of the causes and qualities of the Persons, procuring Dispensations; and therefore, if he affirm the cause just, as the exliffe of a Bishoprick, or the quality of the Person worth, against these there shall be no exception nor averment by Court, or party; yet this point is very imperfect in the Plea; for the Dispensation doth not affirm it assertive as they speak that the Bishoprick was insufficient, but



that the Bishops Petition did so in forme.

But now the Dispensation may be so grossly and palpably unnecessary and inconvenient, as no liberty of discretion can defend it. Suppose it were a man for-quor, and yet that was common with the Pope: but this Statute hath not given it to the Archbishop, and yet it is no otherwise restrained, but by these words, and the Statute of 21 H. 8. And this Commendam is almost as ill-fini-um, in jure reprobatur, It was infinite in nature of dignities and Benefices, in place where, in time when, in order how they shall be gotten or holden: in number, for they may be twenty, or thirty small, or ten very good: I suppose that there were not many worse in the time of Popery. This is like the fraud that is often apparent, where the Father intreats the Son and Heir, 33 H. 6. c. 4. the Lord may enter upon the Heir, not so upon a Feoffee without proof consent, et quiddam perfectus in rebus licitis. See Saint Paul 1 Cor. 10. 23. All things are lawfull, but all things are not expedient. And this is finely spoken byully, Est aliquod quod non oportet etiam si licet; Quicquid vero non licet, non oportet.

See Mildmaies Case Co. lib. 1. 177. A Lease for 1000. years was disallowed, though a power were reserved to limit any estate for years, for any reasonable consideration, as to him should be thought good, yet the land was his own, he had 4 Ed. 2 F. Walf. 11. A Lease of an House and Land, Et quod possit commanum suum inde facere meliori modo, quo sibi viderit expedire, sine contradictione aliquâ, yet he may not pull down the House; for there is nothing more contrary to liberty, then licentiousness, next to discretion, then foolishness, maximâ potentia, minima licentia.

And now for the other word of the Statute that is to say, necessarie. Lex necessaria, est lex temporis, scilicet instantis. And therefore it is well said, necessaria vincula irridet. But this is, when you may perceive the case brought before you necessitie then when the Act is done, the Law permits you not to withhold that assents you, when you have next your last refuge, because you foresee that you shall be given to it, but you must foresee it that necessitie be at his last period: for till then it may be otherwise preventable, or remedied. So I am of opinion, that if a Commendam were granted to a Bishop of a poor Bishoprick of a Church contain, now full, to take effect when it should fall void, that were not warranted by this Statute; for it must be certainly necessary and imminent when it is granted. And here before the Church is hold he may have either Bishoprick, or that Bishoprick may be bettered.

Now to the second great point, whether the Consent of the King called his Primatiation, shall be judged to have the force of a complete Commendam in itself, or shall only serve to give his consent as Patron to the Dispensation, when made by force of the Statute, as was pretended; that is the question.

The second great point.

It is first to be considered, that the King hath power to doe both, tell what he will; and therefore had election to doe the one, or the other, both at his pleasure.

Now in case of elections, where an indifferent Act may be taken either way, let us in the word see how they shall work either by Act of the parties, or Election of a Lay.

Election.

And first, if your Act may work two ways, both arising out of your Interest, Election is given to the patient to use it either way, as Sir Rowland Heywood's case, 37 Eliz. Co. lib. 2. 35. He was seized of the Manor of Dutton, whereof the Demesnes were part in his possession, and part in a lease, and did bargain, and sell the same to Warren, and others for 70 years next his death; and it was resolved by the Judges in the Court of Wards, that the Lessees might use this, either as a common Lease, or as bargain and sale, but not both ways to one intire Act, and so in like things.

And the other Act, if the Act will work two ways, the one by an Interest, the other by an Authority, or power: And the Act be indifferent; the Law will attribute it to the Interest, and not to the Authority: And so you must take it,

for: fictio cedit veritati. And therefore so it was ruled in Sir Edward Cokes Case, Mich. 41. & 42. Eliz. Co. lib. 6. 17. That if a man be seized of three Acres of land holden in Chief, and makes a Feoffment of all to the use of such person, and of such Estate as he shall give, or dispose by his will, and after by his will gives and Devises all his lands to I. S. and his Heirs, that this shall carry but two parts of the land, in point of devise. And upon the same reason is the Case 21 H. 7. of a Feoffment made jointly by the Feoffees, and a cestuy que use.

And lastly, where Interest and Authority meet, if the party declare clearly that his will is; that his Act shall take effect by his Authority; or power; there it shall prevail against the Interest; for *modus & conventio vincunt legem*; and therefore in the same case of Cleares it is agreed; that if the Debtor had rectified his power, and had relied upon that, all would have passed by express Declaration, of the party himselfe. May more though the party doe not make an expresse Declaration, yet if his Act do import a necessitie to work by his power, or else to be wholly void, the benignitie of the Law will give way to effect the meaning of the Party; and therefore in that case it was resolved, That whereas Heyward was seised for example of three Acres of land, every one of equall valets, and conveyed two of them to his wife, for her jointure; and afterwards made a Feoffment of the third, to the use of such person, &c. as before; and then devised that third Acre *ut supra*; that Devise was good by force of the Authority; for else the whole Devise had been utterly void, having before given the other two parts to his wife.

Now then for the minor proposition, how this case fits the former Rules and distinctions. It is first to be observed, that the Kings Patronage, and his assenting to the Commendam in that respect, is proceeding from Interest: But the Kings assenting to a Commendam made by the Archbishop according to the Law, is but a meer Authority limited by that Law, and so far it was performed in the first confirmation by him made. And the making of a complant Commendam by the King, hath an operation out of Interest (if he be Patron) and though he be not Patron, yet is it not a bare Authority derived from another, but inherent in his own person amongst other powers and authorities annexed, and incident to the Crown, to which the Patron must consent.

Now let us see what may be taken to be the Strigs mind in this his Patent. First, if the thing had begun with a direct recital of the former Commendam, and then made his Presentation, and Commendation of the Church to the Bishop, as here he doth; Ita videlicet, &c. secundum vim, &c. prædictarum litterarum dispensationis, the Patent it selfe, est quidam facultatis. No man should have doubted, but that according to this plain declaration, and according to Cleeves Case, it should have wrought no more but the Patent and Act of the Patron, to establish the former Commendam.

Now this in effect sounds as much; for it concludes upon the former, which supposeth a kinde of recital of that former Commendam; in the latter words, in the former part, though it be not exprest: and the secundum vim &c. is to be understood, wheresoever it is placed.

### Dilemmas:

Notes, either there was a former dispensation, or none. If there were one, the thing means to establish that; if there were none, or a void one, it would Customs, 5 E. 4. 14. (which is as none) the thing is to be done; and it is to be done.

How I ask; if the Bishop had taken his 250. Marks a year before, whether by this Patent of the Kings he might have taken this over and above? And so clearly no; for he must take it secondarily, viz. &c. And the Bishopth. being bath acknowledged that; for he saies, that all his livinges are of great value.

Also he pleads that the King by force of his Inple, doth make the said Statute, s<sup>o</sup>lutions prerogative sua Regis, per lapsum temporis, sibi de iure pot<sup>o</sup> differre suas Patentes. &c.

Now his general power to make Commendams to triall dates ended, but

his Interest to establish a Commendam of the Archbishops, is only by force of his Patronage, which he hath by the lapse in this Case, and upon that he hath relied.

Lastly, observe the frame, and it is clear, that the King had no purpose, neither hath the Patent the Tenour of an immediate Commenda; for it doth denote but upon three main clauses, whereof there is but one that is Clausula constitutiva, and the other two are Clausula consecutiva, or consequentes.

The first is, that the King doth Present him, and commend, give and grant the Church to him; this doth Constitute, Present, and Commend the Church to him Actually, and this was proper and necessary for the King to do, as Patron, to give force and effect to the first Commenda; and the words are enough to impose his Assent effectually: and so it is in the Case of Heale, against the Bishop of Exeter, 43 Eliz. No. Entr. 473.

The second clause which must make the Commenda immediate, or none, is not a substantive, or constitutive clause of it self in this form; *Ecce super concessio Dominus Rex eidem Episcopo, quod ei bene liceret*, which yet should have been much checked by the clause of that sentence, *secundum vim &c.* But it is clean contrary thus; *Ecclesiam Commendavi, & concessit ita, ut eidem Episcopo bene liceret, &c.* Secundum vim, &c. which amounts but to this; That the King commended the Church unto him, being his by lapse, to the end to enable him to have it in Commenda, or so that he might have it in Commenda by force, and according to his former Dispensation: there can be nothing more clear.

The last Clause *ad quam rem, &c. ad debitum effectum perducendum*, had no colour at all to make an absolute Commenda; for it doth not pretend to make any new thing, but to bring that to effect, which was before spoken of, *Ita in Case, H. 3. & 4. Phil. & Mar. Diet. 141.* King H. 8. appointed by his Will, that the Lady Mary should have land to hold so long as she should keep her self sole; E. 6. granted them unto her for term of her life, *secundum tenorem Testamenti*, R. 8. She granted a Rent out of them; and then E. 6. dyed: a Quere is made, What shall become of the Rent which depends upon the validity of her estate, whether upon deceit to the King, or not; but clearly, if there had been no Will, the Estate would have been void; for the King was deceived; so here if the first Commenda be void.

In the Case of the Abbess of Syon, 8 H. 6. 33. The King sold of a Manor; with the Advowson appendant granted the Manor to I. S. for life, and then granted the Manor, to I. D. after the death of I. S. *habendum una cum advocatione*. And then by Parliament the King reciting both the grants, confirmed them by Parliament, yet the Advowson passed not.

As to the third great point, whether this Commendatorie might be admitted to plead to a Quare impedit at the Common Law, or by the meaning of the Statute of 25 E. 3. cap. 7. pro Clero Stat. 3. Whereof read the words of the preamble and body (where the Ordinary gives a Benefice rightfully by lapse) so that is the case of a perfect Incumbent, which he calls a Possessor, and then enacts that the Ordinary or Possessor in all Cases like, shall be received to Counter-plead the Title, and to defend his right, although they claim nothing in the Patronage.

The third great point.

First note, that the mischief of the Commendatorie, for not being admitted to plead, ought to move no man; for the very true Incumbent was in that mischief till this Law: so that if the Statute did not relieve this kind of limited Commendatory (whereof, as I have shewed you, no Law or practise ever took knowledge before, nor after that Statute) that he hath no cause to complain.

Note, that if a Commendatory were not in Law a possessor of a Benefice, that is, an Incumbent at the Common Law, then is he not relieved by the Statute; for it makes no new Possessor, but gives the old leave to plead, if he were a perfect Parson, he were within the pluralities at the Common Law and Statute 21 H. 8.



Now let it not seem unreasonable, that he ought to hold his possession, and yet may be so disabled to plead in some sort, that being sued, he cannot defend himself; for if every man might in every Case alike, plead what he would, and in what sort he would, pingui Minervâ, it might be better called talking at the least, then pleading. And Lit. cap. confir. 123. it should seem had little understanding to admonish his sonne, that it is one of the most honourable, laudable, and profitable things in our Law, to have the knowledge of well pleading in Actions real and personall, and therefore counselled him, demitter son courage & coeur de ceo apprehend. And there is (as Bracton says) a great Resemblance betwixen pugna militaris & civilis; And therefore as in a Battell, you will not put every kinde of weapon into every mans hand; nor appoint all men consensually to all services; but sort men according to their severall faculties, and appoint to every man his own station, which he must stand, and not leap into another mans place though with hope of success, (which if he doe with success, yet he deserves death by the partiall discipline, wherof the Romans were the great Masters and Teachers) much more exactly does the Law assigne to every person in this Civill warre, his proper action and office, according to the propriety of his Case and faculty. And therefore at the Common Law, the Incumbent or any other that claimed nothing in the Patronage, could not counterplead the Title of the Plaintiffe, in a Quare impedit; because that was so Title to the Patronage, wherewith he had not to doe. And it was against reason, that any man should contend so, that he neither had nor claimed: The Writte in Assise cannot pleade a release, but shall be holpen by certificate of Assise. And therefore, first the very party to the suite in the case directly his, and the point proper to him, if a release be made unto him between verdict and judgement, cannot plead it, because he hath no day in Court but must help himselfe by Audita Querela.

And therefore to put you but one Case before the Statute, and one Case after to prove this. 18 E. 3. 23. The King brought a Quare Impedit, against the Prior of Duresme, and his Incumbent, and claimed by a grant of the avoidance from the Prior to him, which was no Plea without shewing it; but the Prior confessed it; And the Incumbent demanded judgement, because the King shewed no deed of the grant, which exception was disallowed. Then he pleaded that the Prior made no such grant, which the Prior whom it concerned, had confessed; and both were adjudged against him, because he claimed nothing in the Patronage; so that it lay not in his mouth to plead, and therefore the King had judgement, and yet the mischief of the Incumbent was obviated.

Since the Statute 31 E. 3. Fitz. Incumbent 6. The King brought a Quare Impedit against the Archbishop of Canterbury, and his Vicar, and made Title by Avoidance, while the Temporalities were in his hands. The Archbishop confessed it, and the Vicar denied it, which plea he was to be admitted unto by the Statute, if he were Incumbent; whereupon, for the King it was said, that the Vicar had resigned, hanging the Writ. And though it were excepted, that the King should not be received to say so; yet it was judged for the King, because he could not be received by Common Law, as aforesaid, nor by the Statute, because he was no longer Possessor. But 13 H. 4. 7. It was resolved, that without making Title to the Patronage, a man may shew as Amicus Curie, false Latin, or other matter appearing within the Writ; for indeed, that is no pleading, but remembring the Court of that of which they should take knowledge, of Office: And one plea which in effect is the generall issue in a Quare Impedit, Ne disturba pas, every Defendant may plead without more, because it doth but defend the wrong wherewith he stands charged, and leaves the Plaintiffes Title not controverted, but in effect confessed; who may therefore upon that Plea, presently pray a Writ to the Bishop, or (at his choice) maintain the disturbance for damages. Of this sort of pleading in Law, there is one reason comon to other Actions, wherein title is contained to the land in question, specially, which is that the Tenant shall never be received to counterplead,

plead, but he must convey himselfe, by his plea, a Title to the land; and so avoid the Plaintiffs Title alleged by traverse or confessing and availing. But in the Quare Impedit, there is a farther reason; for both Plaintiffe and Defendant are Actors one against another; and therefore the Defendant shall have a Writ to the Bishop, as well as the Plaintiffe, which he cannot have without a Title appearing to the Court. And therefore, if the Defendant never appear, yet the Plaintiffe must make a Title for formes sake, and so must the Defendant, if the Plaintiffe be non-suit. And upon the same reason is it; That if an Assize be brought against the Disseisor and Tenant, the Disseisor can make no use of the release of Actions reall made by the Plaintiffe to him, because he hath nothing to do with the realty, and yet it is an intire Action, mixt of the realty and personalty. But hath severall respects to severall persons, whereas (if the same person were both Disseisor and Tenant) it were good. If the Plaintiffe demurre upon it, it confesses not.

So if a Wouchee, enter into warranty, the very Tenant can no longer plead; but the Tenant by fiction of Law must plead.

Now the Statute says, he must be the Possessor that must plead. Now it is well said, Aliud est possidere, aliud esse in possessione. And it is confessed unto me, that the Commendatorius semeltris is not within the law; yet he is in a sort in possession; for by a Canonick Title, or allowance, or Commission, he doth gather the fruits, and serve, or cause the Cure to be served; and take and distribute the fruits accordingly, and is no Intruder.

But because the Statute hath always been expounded of a naturall and constant Incumbent, both to the Spirituall Cure (which is attained by Admission and Institution only) and to the Temporality also, by induction, as the Books, and pleadings are clear; Therefore can no Commendatorie for six Moneths nor for six years, nor for lesse time, then for a perpetuity, whereby he may be made a perfect Incumbent, Rector of the Church, and seised in fee to him and his Incessors, be within the word, or meaning of this law; for there is no difference between the Commendatorie semeltris, or for years, or limited Estate, but that this latter Commendatorius hath a clause to make the fruits his own, but not to make him Rector of the Church; which is the essence of an Incumbent; as is well agreed in Grindons Case, and upon my Argument before hath fully appeared.

Now to the fourth point, whether the Demurrer of the Plaintiffe, both together with a Confession of the Plea of the Defendant; That the Church of Clifton should not avoid by the death of Walkenden but by taking of Yelvertoft, and so the Rape accrued to the King whereof the King (though no party to the suit) may take advantage according to the rule of books. It is so clear contrary, as it troubles me to make or offer proove of it.

The fourth great point.

For there is no dispute of things manifestly true or false; for all argumentation is a notioribus.

Now if the thing it selfe be notissimum, we must make nemo Compensatibiles upon Superlatives, Multum valet ad seipsam persuadendam ipsa evidentia veritatis; nec usquam sic non invenio quid dicam, quam ubi res de qua dicitur manifestior est, quam omne quod dicitur. August.

I doe first agree, that a Quare Impedit, between two strangers, if in the debate of the Cause, either by pleading or Confession of the parties, it appear to the Court, that neither of them hath right, but that the presentation belongs to the King, the Court may, nay they must award a Writ to the King to the Bishop; and that without prayer on the part of the King; for the Court and Judges are of the Kings Council: But this must be where the Kings Title appears so clear in alligatis & probatis to the Court, as it is certain and infallible both against Plaintiffe and Defendant, 16 H. 7. 12. Finetix dit que in l'eo cas doit esse ad judge pur le Roy; & 12. H. 7. 12. Mordant dit que est common case: & 11 H. 4. 71. ad judge per Hank & Hill si cleare title appiert a Roy; come per les parties in plea pleadant Fitz. Na. br. 38. G. And therefore I will cite you a Case lately adjudged in the Common Pleas.

*Vide in hoc lib.  
No. Case.*

M. 14. Jac. Regis. rot. 647. A Quare Impedit was brought by the Chancellor, Masters and Scholars of Cambridge, against Sir Edward Walgrave, and others, of the Church of Colney in Norfolk, and declared that Henry Yaxly Esquire was seised of the Manor of East-hall ad quod &c. and was a Popish Reculant convict, and the Church void, &c. Walgrave confessed the Title of Yaxly, but said that he paid not his twenty pounds a moneth, whereupon two parts of the Manor ad qd. &c. were by Commission seised into the Kings hands, and that he granted the said two parts, with the Appurtenances to him for one and twenty years, si tam diu, &c. Now though by the Defendants plea, the Kings Title did appear against him, yet the Plaintiffe was demanded by the Court what he could say, &c. Who confessed the Kings Title according to the Bar, and disclaimed in their Title; and so a Writ was awarded to the Bishop for the King. Now in this case there is no other confession against the Plea of the Title set forth for the King, then such as may be enforced out of the Demurrer of the Plaintiffe, upon the Defendants plea.

Now there is a great difference between a direct Confession of the party by a bene & verum &c. and a nient dedire, or a Demurrer, that is between a direct Confession of the party against himselfe, and an admittance by implication, or a verdict finding it, or the like, as in 2 H. 7. 16. If a man bring an Action of Trespasse against A. quod ipse simul cum B. & C. did the trespass, and doth not sue them all, his Writ shall abate; and if he bring his Action against A. and he plead the trespass done by him and B. and that the Plaintiffe released to B. and the Plaintiffe traverses the release, yet his Action shall not abate, so 9 H. 7. 3. If a man abate for two rents, and the one of his own shewing appears not due, the whole Shewyng is attours; otherwise, if it were so found by verdict.

Again, here the point (whereof advantage would be taken as confessed) is by way of Protestation denied, that is, that Walkenden the Incumbent did not accept Yelvertoft, nor was included in the same, and then there was no avoidance of Clifton, being the former Benefice; and consequently in Lapse. And if it were no avoidance by that Law, it could not fall into Lapse by the simple plurality, without notice to the Patron, which is no where alleaged.

Lastly, because the Law requires in every Plea two things, the one, that it be in matter sufficient; the other that it be deduced and expressed according to the forms of Law, if either the one or the other of these be wanting, it is cause of Demurrer.

And as all policy and order instructeth a man, first to skirmish and practise some slight defeats before he join Battell; so we begin first with Pleas to the jurisdiction of the Court, then to the person, then to the Writ, then to the Action of the Writ, and then to the Action it selfe. And upon all Demurrers the arguments begin ever with the points of forme before they speake to the matter of Law. And see the Earl of Leicesters Case Ple. Com. 400. in the Kings Bench, where the judgement was given up by the Clerk, quod placitum predicti Ch. Heydon modo & forma predictis placitatum minus sufficiens, in lege existit, &c. which was said to be the form in that Court; yet because the Counsell said that they demurred as well for matter as forme, at their request the Court ordered that the entry should have the clause, materiaque in eodem contenta minus sufficiens, &c. as it is used in the Common Pleas.

And observe that the Demurrer in this case is, Quod placitum predicti Episcopi modo & forma, predicti placitatum & materia in eodem contenta minus sufficiens, &c. ab actione sua precludend, quod ipsi ad placitum illud modo & forma predicti placitatum necesse non habent nec per legem tenentur respondere, & hoc, &c. which falls full to this, What whatsoever the Plea is, they are not bound to answer it in forme, as it is pleaded; and therefore it were madness for them, by answering it, to allow it good, and make themselves answerable to it. And note if the Defendant here be no possessor within the Statute, then his plea is as none, not for insufficiency of matter but for incompetency of the person pleading which is the cause of Demurrer.

After



After all the Judges had argued, we assembled in Serjeants Inne, the rather because the King desired there might be a conference, where it was found and agreed (as I observed in the beginning) that seven of us had delivered our opinion, that judgement was to be given for the Plaintiff, and that the other 5 were against the Plaintiff either as for the King or for the Defendant.

So it was agreed by us all, that judgement should be given for the Plaintiff. Quod habeat breve Episcopo. Nevertheless because Crooke (who was one of the seven for the Plaintiff) had added in the end of his argument, that knowledge should be taken of the truth of the Kings title (being as it is disclosed, and in some sort either admitted or not denied) before execution should be awarded; we also all thought it just, both for matter and forme of writ. That all parties should be called, and the state of the present avoidants and plenarty understood.

Whereupon judgement was this Michaelmas Terme entered, pro querente quod habeat breve Episcopo; and order given, that no Writ should go forth, neither to the Bishop nor to the Sheriffs, to enquire of the points of the Writ, till the Court gave further order.

*Benedict Winchcombe against the Bishop of Winchester*

and one *Richard Puleston.*

Pasc. 14 Jac. Rot. 1026.

Quare Impedit.

Benedict Winchcombe brought a Quare Impedit against the Bishop of Winchester, and Richard Puleston; And the Case was this, That one William Waller being seised of the Church of Leck-ford, and Watton being Incumbent of it, and a man grievously pained with the Strangurie, and like they say to die. Say bargained with Waller for 90. l. that he should present, or

Statute 31. Eliz. Simony expounded.

make him to be presented, whensoever the other dyed; And for the better and effecting thereof, it was agreed between them, that Waller should grant short Avoidance unto one John Edden a speciall Friend of Sayes upon Conscience, &c. Which was done accordingly. When Watton the Incumbent dyed, John Edden in execution of the Simonicall agreement aforesaid, presented Say, who was admitted, &c. And then Waller granted the Manor and the Advowson to Winchcombe the plaintiffe for yeares. Say dyed, the King presents Puleston who is admitted, &c. And Winchcombe brings the Quare Impedit against the Bishop of Winchester, and him who pleaded all the matter of Simony aforesaid, as Person impersonae; whereupon issue was taken and found for him. The question made by the plaintiffe in arrest of judgement was, whether the King or Winchcombe have right to this Presentation, which depends wholly upon this, whether the Kings turn growing by reason of the Simony be satisfied by the presentation, &c. and death of Say that came in by the Simony.

How the Kings title begins and continues by it.

This case after divers Arguments at the barre pro & contra was argued by us, at the Bench openly and at large; And we all sours agreed, that Judgement was to be given for the Defendant, that is to say, for the Kings title by the Simony. And Hutton, now this Trinity Terme, being come newly to the Bench, having been before for the Plaintiff, was now of opinion with us, and argued. My own Argument I set down, which was thus.

It is against nature that any thing should be both void, and not void at once, but to severall respects it may be.

As at severall times. If I bargain and sell to A. and before inrolment, doe bargain and sell the same to B. which is inrolled, now this estate is good. But if that to A. be after inrolled in due time, the other is ipso facto void.

1.

A thing may be void to one purpose, and not to another; as if one seised of a Rent be bound in a Statute, and the rent be released to the Tenant of the land, it is utterly of it selfe extinct and void, but yet as to the Cognizee &c. And so his execution it is in being, Cok. lib. 7. 38. Lillingtons case;

2.

A thing may be void, or not void, at the Election of him whom it concerns, as in Hollands case Anno 9 & 10 E. 3. If a man having one Benefice take another without Dispensation though he be not inducted, and so not within the Statute of 21 H. 8. yet the Patron of the first Church may take it as void and present presently, or may leave it as full till sentence of Deposition.

A thing may be void, and yet not to be avoided in every manner; wherein I will not use the example of Ordinances made void upon the Statute of 8 H. 6. which is well expounded, void by writ of Error; for such cases are not void indeed but voidable onely; as there is great difference between a writ abated, as by the death of the parties, and onely abatable by plea to the writ. But a Sheriffs Bond against the Statute of 23 H. 6. is utterly void; and yet you cannot plead non est factum to it, but you must plead the speciall Case, and conclude judgment si actio, or so not your deed, Dive & Manningham & 37 H. 6. 1. so a Froffement fraudulent shall be avoided by not guilty, not by issue ne infamia post vide Case Humberston & Howgall Tr. 12 Jac. my own Reports, Sup. Gooches case, Co. lib. 5. 60. in Burrells Case Co. lib. 6. But the Commonest cases are that the same thing may be void as to one person, and not void as to another, and that commonly runs upon this distinction, though it be made void against some person and for some purpose, yet it is ever good against the party himself that made it, as are the Cases of fraudulent Conveyances and Alienations of women tenants in Dower, or jointresses upon the Statute 11 H. 7. and that is the least that can be made of this Case. That this presentation, or made upon Simony is utterly void against the King, and the Church in no sort filled by it. Which being so, it is repugnant in it selfe, to say that it shall be both void and not void at once against the King. Now it is confessed that it is utterly void against the King during the life of Say, so that the King might present as to a void Church; which being granted it is absurd to say, that his death should alter the Case; for the King cannot be dispossessed or barred, but by an Act; and the death is a pythation but no Act: Therefore now observe the Error, that growes by not well observing the reasons of Cases, which are their Causes; so Tum demum scimus, cum per Causas scimus, as Baskervilles Case is cited, that if the King have a title, or (as Justice Brown says in the Lord Barkleys case Plow. 249. against Weston there 243. who delivers his opinion without either authority, or reason.) Grant of the next Avoidance, and an usurpation be made upon him, and the Clerk die, now the King hath lost his turn. These Cases I grant; for it is apparent, that the Presentation made the usurpation and filled the Church; which the King could not undo, but by Quare Impedire, after Induction; But the death of the Incumbent did not fill the Church, but it hath so satisfied the Kings turn, as he cannot take another, because so much is had in the Kings default, as his turn amounts unto; & the owner of the Advowson must be no longer kept out, neither by Law in case of title, nor by the grant.

Now this Case is clean contrary; for here all the Acts that should fill the Church, are made utterly void, and the pretended Incumbent disabled to be Incumbent, even from the first Simonical procurement, which was before the Presentation, so as there was never in Law Presentation, or no more then a Parson dead to this purpose in law; nay more, he is disabled for ever to take that Benefice of any other Presentation; and therefore this Simonical Presentation cannot fill the Church against the King, as the usurpation doth in the other Cases; and the death consummate that that was never began; And therefore the Statute would have been vainly and ignorantly peuned, if it should have said that the Church should have been void, as if he had been naturally dead; for in this it is, as though he had never been, as in the said Case of Grindons; and therefore the Law proceeds to give it upon this branch to the King for that time and turn only, which is for that avoidance onely; which is not yet filled nor satisfied by this Idol, or shadow of a Presentation.

And note the Pleading is, that Edden presented Say, and that he was admitted,

no, et. Quorum preterea, & vigore statuti, the presentation, &c. were void  
kind of expugnancy; but see Grendons Case Pleaded, Plow. 495. that the  
Church being full of the Dean and Chapter, Edw. 6. Presented Chamberlaine  
was, &c. which Presentation, &c. were utterly void; And note that Case is  
in this: here the Parson is incapable of the Church, there the Church was not  
full of the Parson; and though the Presentation and all the Acts be made  
void, yet it was necessary to express them; for without a Presentation Actual,  
by Simony the King could not have the turn. And if the Statute had onely  
made the Presentation void, and not given it expressly to the King, it would  
have fallen to the Patron again, as it doth upon the case of Institution by Sim-  
ony, and so the Statute should have rewarded him for his Simony.

Besides note, that in the other Cases of lapse and grant before mentioned,  
by usurpation and death, the King has a turn precedent, upon which an  
usurpation was, and might be made by the presentation & so he dispossessed; But  
here it is clean contrary; for the pretended presentation gives the King his  
Title, and therefore cannot also dispossess him of that Title that it gives  
him.

For if a Patron would contract with one for Simony, and then will present  
another without Simony; the King gaines nothing; so there must be an Act  
though not an effectual presentation. But if once the Patron have presen-  
ted by Simony, the King is straightwaies interested (though no admitti-  
ment follow) by the expresse words of the Statute: And the observation of the  
three severall clauses, makes the difference of the consequence evident.

For the first, finding the Patron guilty makes his Act void, and gives his  
turn to the King *ab initio*. But the second clause, finding the Patron innocent,  
and the Simonic to begin in the Institution and the Induction after; makes  
the Church void only from the Induction, and so allows this to be a Plenary;  
and gives the next turn to the next Patron; so upon the last branch of the  
Statute, if a Clerk that gets orders by Simony, obtains a Benefice lawfully  
within seven years it is made void: but how? From the Induction, as if he  
were dead, and the Patron to present. If either of these had been Evident  
at Winchcombe should have presented now: So that if a man have a grant  
the next Abp'dance, and present one without Simony that were instituted  
and inducted, or got orders by Simony; yet his grant were executed, but in the  
Case of a Presentation by Simony it is truly executed, when the King  
presents upon his Simony, for then is the turne fully executed though it were  
attempted before.

And (the secrecy of Simony considered) to take this exposition, were to  
violate the Law; for if the Simony be concealed till death all were safe,  
which the Statute well perceiving gives no lapse without notice against the  
common Patron upon the second and last branches and by the same reason, can  
impute no Laches to the King, for which it should deprive him of his Presentation.  
But I grant if this Clerk should resign or the like, and a new Clerk were  
presented and dyed, that now the Kings turn were lost, as in the other ordinary  
Case, and upon the same reason.

All this is spoken, as if this were only void against the King; But I hold  
it utterly void even to strangers that may take lawfull advantage of it; and there-  
fore note the nature of the Case, that it is *contractus ex turpi causa*, & contra  
bonos mores, and so it is against Law, and void, by the Statute, even between  
the parties; yea, and strangers shall take the advantage of it, like as if a man  
be bound in an obligation usurious, the Bond is void between the parties and  
therefore if such an Obligor makes his Creditor and die, and the Creditor pay  
an usurious Bond, other Creditors may shew it, and make a Devastavit of it.

So I hold in this Case, that if a man be bound to a stranger to present L. S.  
to a Benefice, and he present him upon a Simonicall promise with another  
stranger, yet the bond is forfeited. If the King should pardon the Simony, yet  
I hold clearly, that the Church should still remain void to this presentation; even  
as



as the Kings release of Usurp. will never make the Bond other then void. A Bond for performance of Covenants, whereof if one be broken, though that be released, yet the Bond is still under forfeiture. I hold also clearly, that if this Parson sue for Witches in the Ecclesiastical Court, or for his treble damages, at the Common Law, that the Parishioners may plead him no Parson, because of the Simony; for otherwise, if the King should present, and his Clerk be received, he must not pay both, and to whom he shall pay, is at his peril, upon the Simony; or not. And if the Ordinary refuse his Plea, he may have a Prohibition; for it is made void by a Statute Law, by which the Spiritual Courts are bound: And it is much stronger, than the Case upon the Stat. 13. Eliz. whereupon it is resolved by the last Case; that if a man being one Benefice, accept another, and be instituted and inducted into the second, and then read not his Articles, that yet the first Benefice, holds not by Cession, because the second is as not taken. And so in the Case of Norris and Eaton, it was adjudged void even to the Parishioners.

But now I say, that it was void to all men, quorum interest; to the King and his Incumbent, and all that claime under him, and to the Parishioners, to the Ordinary, and to the like, for all things that may concern that point, and the parties interested in it.

But clearly it is not void to an Usurper, for a man without right cannot present unto it as to a Church void, nor the Ordinary so discharge himself, if he receive the Clerk of an Usurper; for he is none of them quorum interest.

Also, if one having a prochein abondance present by Simony, and his Clerk be received, he shall never present againe, as taking this to be void, and so his turne to remaine. For as to him it is full, he shall not disable his own Act, nor can have reason by the Kings Title to doe it.

And though Winchcombe were no way pishie to the Simonie, that both him no good, as to this case; for the Patronage cannot come to him, till Eddens turne be satisfied; which remaines still void to this purpose, notwithstanding his Simonicall presentation, till the King presented Pullstone. After judgement given for the Defendant, his Councell informed that he was not inducted though he had pleaded as Parson imparsonce and therefore prayed a Writ to the Bishop for the King, or upon formise thereof a scire facias for the King, wherby he should not have execution. But the Court denyed both; because they must be contrary to the Record: yet quare because the Clerk cannot plead unless he be inducted, and the King being his Patron though he be not inducted, can not be named with him. This point being often debated at the Bench, was at last in Mich. Terme Ann: 15. Jac. resolved by my self and the Court, as followeth infra.

Somerfet.  
Waller.

Stukeley vers. Butler.

H. 12 Jac. Rot. 827.

SIR Thomas Stukeley brought an Action of Trespasse against Robert Butler for selling of certaine Dakes and Ashes, &c. at old Cleave, whereunto the Defendant pleaded not guilty, and upon a speciall Verdict the Case was thus. The Earle of Suffex 36. Eliz. was seised of the Mannor of Cleave wherof a messuage called Scour, and 100 Acres usually occupied with it, and 700. more, and certaine Woods called Blagrove, Pitchill, Erridge, Bore, and Read wood, all lying in Cleave were parcell; and the same year did demise unto Robert Butler & Julian his wife, and Robert their Son now Defendant, the said house and all the Lands, and Blagrove and Pitchill wood, for their lives (excepting all Timber Trees.) And then the same year by Indenture, did bargain and sell to Edward George, Omnia illa, boscos, subboscos, macremium et arbores sua tunc stant crescent, & existant in & super toto illo Manerio suo de Cleave, in dicto Com. Somerset, viz. in & super tota illa Copicia sua, sive bosco vocato le Erridge wood, cont. 24. Acr. Et in & super toto illo bosco vocat Borewood,

Boorewood cont' 10 Acr'. Ac in & ſuper toto illo bosco ſuo vocat' Blagrove Wood, cont' 6 Acr'. Et etiam in et ſuper toto illo alio bosco ſuo vocat' Pitchill Wood, cont' 7 Acr', una cum omnibus aliis boscis, & ſubboscis, maceremio, et Arboribus ſtant' & exiſtent' ſuper præd' Manerio de Cleave quæ convenienter parcarî poterint & ſuccidi ſine præjudicio & damno ad Statum & mandren' Anglice, the State and maintenance dicti Manerii de Cleave. And a Covenant of the part of the Earl, that the ſaid Gorge, and his Assignes during five years may fell and carry the Woods without interruption of the Earle, or any others; and to make ſawing Pits, and to ſquare, and cut the Timber upon the ground during the ſaid Terme, and a Covenant on the part of the Leſſee, that he ſhould fill up the Pits, and make all things faire, and amend the fences that ſhould be broken during the ſaid Terme of five years. Then Gorge, Ann. 38. did bargain and ſell all the woods to Prowſe and Prowſe the ſame yeare, did bargain and ſell to Robert Butler, the Father, all the Woods in Blagrove and Pitchill-wood, and in the ſeven hundred Acres; ſo the Woods in the hundred Acres, going with the Houſe, and in the other three Woods, remain ſtill with Prowſe; who after Anno 40 Eliz. did bargain and ſell unto the Earle of Suffex, all the Woods by him ſo ld unto Gorge, except thoſe that he had ſold as aforeſaid to Butler the Father. Then Butler the Father by his Will did give unto Butler his ſonne the Defendant his Woods. And the Earle 30 Jac. did bargain and ſell by deed, inrolled unto Sir Thomas Stukeley, the reversion of the ſaid Lands, and all his Woods in 1420 l. to which Butler the Father attorned; and then he and his wiſe dyed, and Robert Butler the ſonne, and Lewis the other Defendant, as his ſervant, by conſent of Trevilian and others the Executors of his Father, ſelled certain of the Trees in the Declaration, which was Timber at the time of the grant in Blagrove Wood and Pitchill Wood, and other of the Trees in the ſeven hundred Acres, and the Jury aſſeſſed damage ſeverally for the Trees, ſeverally ſelled in either Wood, and for thoſe in the 700. Acres, which was well and adviſedly done.

Upon this whole Cauſe I am of opinion that the Defendant had good Title to all the trees ſelled, as well thoſe in the 700 Acres, as in the two Groves, and that therefore the Plaintiffe is to be wholly barred.

I make but two queſtions; The firſt, Whether the Viz. hath power to re- ſtrain the generall grant of all the woods upon the whole Manor, to the woods only growing upon the five Groves; or that the ſame generall claufe being certain and expreſſe ſhall make void the Viz. And I am of opinion that the Viz. as the whole Sentence is, is utterly void. The firſt point or Queſtion.

The ſecond queſtion is, Whether the Covenant on the part of my Lord of Suffex with Gorge, to take the trees, &c. within the five years next after the grant, ſhall ſo check and controll the Grant, that he may not take the trees after the five yeares: and I am of opinion clearly, that it doth not controll the Grant, but that as the trees are abſolutely given, ſo the Bargainees and their Assignes may take them when they will. The ſecond Queſtion.

Thirdly, I will give you my opinion concerning that part of the Claufe that runneth under the una cum omnibus aliis, &c. upon which I hold, that that part of the Claufe giveth nothing, becauſe it is void for uncertainty, and yet it butteth not the former Claufe, becauſe it is diſtinct, and ſtandeth of it ſelf diſtinct in his power and operation from the other.

As to the firſt point, whether the Viz. doth reſtrain the generall grant of all the woods, upon all the Manor, to the woods upon the Copices only. The firſt point or Queſtion.

I am of opinion clearly, that it doth not; and therefore I will conſider, firſt, in generall, how the premiſſes of a grant may be checked, reſtrained, corrected or explained. The force and uſe of a viz.

It may be corrected or reſtrained by a diſtinct claufe, or by a connexion of one claufe.

By a diſtinct claufe, either in the thing given by an exception; or in the ſtate

state given by a Habendum: But both must be where the premises of the Grant are not speciall and expresse, but general and implied, as to the purpose restrained.

And therefore though the Law say, that when a man grants lands, he grants the underwoods inclusively, and so when he grants his house, he grants all the severall roomes in the house, yet M. 33. & 34. Eliz. in the Kings Bench between Kenisham and Redding, the case was, that the Queen leased the Parsonage of Greenwich, with all the lands and underwoods expressly thereunto belonging, (exceptis omnibus grossis Arboribus, hoscis, & macremis) The opinion of the Court was, that the exception as to underwoods was void. But they held that the exception was onely to be extended to great woods. So is the case 9 Eliz. 265. of a Lease of an house and shops (excepting the shops) which proves that the rule, expressio eorum quæ tacite insunt nihil operatur, is to be understood having respect to it selfe onely, and not having relation to other clauses.

So a Lessee may be restrained by a condition, not to alien 21 H. 6. 33. but not if the Lease be to him and his Assignes, as an office of trust to one, and his Assignes gives power to grant it over.

A condition annexed to an estate given, is a divided Clause from the Grant, and therefore cannot frustrate the Grant precedent, neither in any thing expresse, nor in any thing implied, which is of his nature incident and inseparable from the thing granted.

And therefore Sir Anthony Mildmayes Case, Co. lib. 6. 46. A gift in full upon condition not to suffer a common Recovery, if leases upon the land and the estate, but it takes away a liberty which is inseparable from the estate, as to a fee, not to alien. And a grant of a house upon condition not to meddle with the shops, is void; for this doth not as an exception reserve the shops to the Lessor, and from the Lessee; but leaves them in the Lessee, and then forbids the use of that it hath made his; which is repugnant. So upon Whistlers Case, Co. lib. 10. 63. though it be well said, that when the King grants a Manor, cum pertinentiis, if no more passeth the Abbotson then, if it is more expressly excepted; yet the words adeo plenè, &c. will carry it in the one Case, not in the other, when it is excepted. So converso, the Manor adeo plenè, will admit an exception of the Abbotson: not if it were expressly granted.

Upon the same reason is it, that if you demise a Manor, you may by an exception pare away as much of the Demesnes or Services, or both, as you will, but you must leave it still a Manor, having some Demesnes, some Services, and a Court. This I mean, when that that you have, is such a true Manor, as hath both Demesnes and Service; for though a Manor may stand and passe by that name, that is but titular, yet your Grant shall be taken, as the thing is that you grant.

Again, by an exception, you shall not make the whole Grant frustrate, though the Grant be in generall words. Therefore if you have but one Close in D. and you demise all your land in D. (excepting that one Close,) the exception is void.

18 Eliz. in the Kings Bench, Dorrell brought an Ejectment against Collins in Lamberhurst, in the County of Kent. The Jury found that the Masters and Scholars of Linkford, were seised of the land in question, being part of the Manor of Hothley in Lamberhurst, and that they did demise all their lands in Lamberhurst, excepting the Manor of Hothley, under which the Plaintiffs claimed; and they found that Lamberhurst did extend into Kent and Suffex, and that the Master, &c. had no land in Lamberhurst; but the Manor of Hothley, and it was adjudged that the Lease did carry the Manor of Hothley, and that the exception was void. And also that the Jury being onely of Kent, ought to find that they had no lands in Suffex, as well as in Kent, because the issue, guilty or not guilty, depended upon it; otherwise where a locall thing in another County, is specially put in issue.

The Law is of the use of an Habendum, that if by your premises you have given no certain nor expresse Estate, then that otherwise the Law would give; you



you may alter and abridge, nay you may utterly frustrate it, by the Habendum. And therefore in the Case of Hodge and Grosse M. 33. & 34 Eliz. in the Kings Bench one Warren made a Feoffment of Lands in London Habendum to the Feoffee, and his heires after the death of the Feoffor; and upon argument, the Feoffment was ruled to be void.

And yet in the Case of Underhay, and Underhay, Hil. 34 Eliz. in the Kings Bench the Case was; That one having leased his Land to three for their lives, granted the Reversion Habendum to the Grantee for his life; and then added these words, which said Estate for life to begin after the death of the three first Lessees. And that was adjudged a good Estate in reversion for life.

Neither can you by an Habendum frustrate a Grant that was complete before, as the Case is 7 Ed. 6. where a Lessee for years granted all his estate Habendum after his death.

So much of divided Clauses.

But now of one Clause carried on with a connexion, so as they make but one entire sentence, till the whole be finished, the Law is otherwise; for one part of the sentence may not onely abridge and correct, but utterly frustrate and make void the whole Grant. And therefore if a Lessee for years grant his Terme after his death, the Grant is void.

So in Doughryes Case, Co. lib. 3. 9. the Case was, That the Duke of Northumberland was seised of divers Houses and Cottages in the Parish of Saint Sepulchers London, and bargained and sold all his Tenements in the Parish of Saint Andrewes Holborn, in the Tenure of one William Gardiner, unto one Lea; and the Grant was judged both, though those Houses were in the Tenure of Gardiner, which was the point judged; But where it is added in that Case, that the Court was of opinion, that if he had begun with the Tenure of Gardiner, which was true and ended with the Parish mistaken, that the Grant had been good by the rule, utile per inutile non vitiatur; I hold it plaine contrary; for the severall circumstances and descriptions circumscribe and ascertain the Grant. And it is a good Rule, Incivile est nisi tota sententia perspecta de aliqua parte judicare.

And therefore the Judgement in Doddingtons Case Co. lib. 2. 32. is full in the point. H. 8. was seised of the Hospitall of Welles, whereof certaine lands in Dindace, out of the Circuit of Welles, which were in the Tenure of John Browne, were part, and he granted unto Ailworth all his Lands, in the Tenure of John Browne situate in Welles to the said Hospitall belonging. And it was adjudged, that though the first part of the description as it was placed in the Patent in the Tenure of Browne were true; yet the latter part (being false) murthered all, even if it were the grant of a common person. And indeed in one sentence it is vaine to imagine one part before another; for though words can neither be spoken nor written at once, yet the minds of the Autho: comprehends them at once, which gives vitam et modum to the sentence.

But in grants of particulars sufficiently once ascertained, another mistaking will not frustrate, though it be false. As Pas. 23 El. Dyer 376. One made a Feoffment by Attourney of a messuage in D. which was R. Cottons, and indeed it was Th. Cottons, yet it passed; for else all was to be frustrate; but a thing certain may be diminished, though not wholly made void, as in Ognells Case, C. lib. 4. Rainsford possessed of a Terme in Cruel Grange, whereof part, that is to say Hobsfield came to one Frecklon in possession for part of the Terme, and to one Beer, for the rest of the Terme in reversion; and a Rent charge was granted out of Cruell Grange, nuper in Tenura Rainsford, et modo in tenura & occupatione Beer; This did not charge Hobsfield but it charged the rest, and so there was no repugnancie.

Now I come to the use of a (viz.) or (sc.) or in english (that is to say) and the nature and force of it. It is neither a direct severall Clause, nor a direct entire Clause, but it is intermedia.

First it is clear that it is not a substantive Clause, of it self, and therefore you can neither begin a sentence with it, nor make a sentence of it, by it self; but it

is (as I may say) *clausula ancillaris*, a kind of hand-maid to another clause, and to deliver her mind, not her own. And therefore it is a kind of Interpreter, her naturall and proper use is to particularize that, that is before general, or distribute that, that is in grosse, or to explain that, that is doubtful or obscure.

First, it must not be contrary to the premises, as 20 H. 6. Trespass with a Continuando, till the day of the Writ purchased, sc. such a day, which is not the same, is utterly void.

Next, it must neither encrease, nor diminish, for it is not the nature of it, to give of it selfe: As if I have in D. Black-Acre, white-Acre, and Green-Acre; and I grant unto you all my Lands in D. that is to say, Black-Acre and Green-Acre; yet Green-Acre; shall passe too; but if I adde under the viz. land lying out of the Ecton of D. it shall not passe. And therefore see 29 Assize 23. upon a partition, between two Partners in Chancery; one of them for a surplus-plussage, granted unto the other two, a Rent of five pound a year; that is to say, to the one fifty shillings and to the other as much; yet it was judged an entire Rent. And 29 Edw. 3. 39. It is holden, that if I grant a Rent of 20 s. out two Spanes, sc. 10 s. out of one, and as much out of another, it is but one Rent. So are Knights Case, Co. lib. 5. 55. and Winters Case, 14 Eliz. Dyer, 308. upon a difference where the Rents are reserved severally at the first, and where they are at the first entire, and broken by a viz.

So 18 El. Dyer 350. an Obligation of two hundred pound, to two solvend. the one to the one hundred, & the other to the other, the Book leaves a quare; but it is clear, a Void solvendum. So Hill and Granges Case. A Lease made in April for example, rendering a yearly Rent (that is to say) at our Lady day, and Michaelmasse, the yearly payment cannot be diminished. Osborns Case Co. lib. 10. 13. in Anglice, (which is but a viz. or that is to say,) shall never exceed the Latine.

But now I grant on the other side, that a viz. may work a restriction where the former words were not expresse and speciall, but so indifferent, as they may receive such a restriction without apparent injurie; though those former words by construction of Law would have had a larger sense, if the viz. had not been; and therefore see 7 E. 3. 9. Mortimers Case: One granted ten pound of Rent; (Note not a Rent which must (as I have said) be understood one Rent of ten pound) in his Spanes of D. to receive by the hands of one Tenant so much, and so from one Tenant to another, till he made up ten pound, saving his Signiorie. And the opinion of the Court was, that this was but a Grant of the severall Rents of those Tenants, as Rent seck by this viz. which has been otherwise, if it had left at the premises without the viz. for then it would have been a new entire Rent of ten pound out of the whole demesnes of the Spanes. But I am of cleare opinion, that if the particular Rents in the first Case had made but five pounds, that then the premises would have taken place, and the viz. had been void. Like unto the Case 15 Ass. 11. & 15 Ed. 3. Fitz. charge 9. If A. grants twenty shillings Rent in his Spanes, viz. by the hands of one so much, and of another so much; and the Tenants assigned are but Tenants at will, the whole Spanes is charged, for the (viz.) being of no effect, is void in law: for it self being of no effect, cannot frustrate the premises, which are of sufficiency of themselves, 8 Ed. 3. 59. One gave land to A. and B. Habendum to A. for life, and after his decease to B. This was holden good. So Littleton 66. If a man give land to two Habendum to them, sc. the one moiety to the one, and the other moiety to the other, it is good. For note, that the substance of the premises is not altered; for both of them have the whole in use, in common as they should have had it by the premises jointly, which is but a point of quality, or accident altered. But if it were twenty Acres to two, sc. ten to one, and ten to another, it were void. So upon the Cases 21 H. 6. 7. & 13 H. 7. 24. I hold, if I grant Land to one, and his Heirs, viz. the Heirs of his body, it is an estate taile. So 13 Eliz. Dyer 299. In a Quare Impedit, one is pleaded seised of a Spanes, to which the Abbotsdon appends, viz. to Present in the third turn, it is good: but if one seised of a whole Abbotsdon

Whom should grant the whole, viz. to present every third turn, the viz. were not. So upon the Case 9 Eliz. Dyer 261. If a man have Lands in a Hamlet, and other Lands in another part of the Toton; if he grant his Lands in that Toton. sc. in the Hamlet, I hold that no more will passe. But if he grant all his lands in the whole Toton, viz. in the Hamlet, all the land will passe, and the viz. is void, and 6 Edw. 6. Dyer 77. The King granted scitum Abbathie nec non omniaterr' prae'pastur' & subscript' dict. Monasterio pertinen', viz. Such a Close, and such a Close, and the opinion is, that the viz. shall only serve to explain the words subscript', and that all other the Lands belonging to the Monastery, shall passe by the expresse words.

Now to the second great point, which is, whether the Covenant on the part of the Grantor, for the five years, doe disable the Grantee, or those that claime under him, to take the Trees, after the five years expired. The second great point;

I will say little, for I declared my selfe in the beginning not to hold that reasonable, neither do I yet.

For first, it is clear, that by the grant of the Trees by a Tenant in Fee-simple, they are absolutely passed away from the Grantor, and his Heirs, and vested in the Grantee, and goe to the Executors or Administrators, being in understanding of Law, divided as Chattels from the Freehold: And the Grantee hath power incident and implied to the Grant to sell them, when he will, without any other speciall licence, which can never be restrained by a power given by the Grantor in the affirmative, which the Grantee had before.

And therefore 8 Aff. 10. One granted a rent of ten pounds a yeare to the husband and the wife for their lives; and if the wife survide, that then she should have three pounds a yeare for her life, and judged she should hold her ten pound rent: Otherwise, if it had been said that she should have three pound a yeare and no more. And so Trin. 28 H. 8. Dyer 19. The Lessee Covenanted that the lessee might take thorne by Assignment of the Waplitte, yet he may take without; otherwise, if it were in the negative.

Statutes that are taken by intent, shall not be an affirmative after a for- power, 33 H. 8. Dyer 50. The Stat. 27 H. 8. 17 Eliz. Dyer 341. hereafter.

Now the Grant implying an absolute liberty to the Grantee to take, if the Covenant were on the part of the Lessee, not to take after the five years, it would not extinguish his property, nor consequently his power, to take them after the five years; and therefore if he took them, he might plead not guilty in Trespass, he should be answerable to an Action of Covenant for it; so things have their proper effects and considerations, and severall respects of Actions are not to be confounded. And therefore 3 Eliz. Dyer 199. If the Lessee Covenant to repair the house at his proper Costs; or again, if the Lessee Covenant to repair the House at his proper Costs in Timber work, and the like, yet in both Cases if he felled Timber to repair, there is no change in the remedy, by Action of Debt, but by Action of Covenant.

The Statute of 27 H. 8. of Court of Augmentation, all Grants of Lands within their survey, shall be sealed with that Seale, yet see 33 H. 8. Dyer 50. For want of a Negative, much more if it had been (may be sealed) as here, 17 Eliz. Dyer 341. the late Monasteries were given to the King; Proviso, to avoid fraudulent Leases within the year of the dissolution, and another Proviso in the affirmative, that Leases with the ancient Rent shall be good: Yet judged that a Lease within forty dayes without ancient Rent was good, so they had lawfull power before, and there is no negative.

Lastly, this Covenant on the part of the Grantor, hath its necessary use, though it work nothing in the restraint of time for selling; for it gives power to dig, and make Saw pits upon the ground, and to square the Timber there, which the Grantee could not doe by the simple Grant of the Timber, without such a speciall Warrant. Also it contains a generall warranty, that the Grantor may take and sell Timber, without the let of any person or persons whatsoever.

Now



The Clause  
and can com-  
but also.

Now to the third and last point: If the clause had been that the Earle had granted all his Woods and under-woods growing upon all his Manor of Cleave, which could conveniently have been spared without prejudice to the Estate of his Manor, I should be of mind that this Grant were void.

And yet it is true, that many things that are uncertaine of themselves, being reduced to certainty, by such meanes, as either the Law appoints, or the party himselfe assigns, may take effect; and therefore the Cases put are cleare, that the fine of a Copyholder being uncertaine, shall be made certaine and reasonable by the Jury and the Court, upon the circumstances of the Case. So of convenient time of remove upon the death of a Tenant for life, 41 E. 3. barr. 205. In trespass for eating his Coyne, The Defendant pleaded that he had Common, and the other left his Coyne there after other men had carried, & it was ready to be carried, &c. De vill will, &c. The Plaintiffe, that it was not disp. &c. But note that all these and the like are provisions in law, for Acts in law. Also I grant that if the Earle had covenanted or granted that Gorge might have taken such Trees, as might conveniently have been spared without prejudice &c. That this being but a Covenant, or grant executory, he might have taken Trees by force of it and have justified, specially averting that they might be spared, and put himself upon the Jury for it. But our Case is not of that nature, but it is a Grant or bargain, which must take effect and change the property of the thing granted, either presently & at once, or inchoative depending upon somewhat that shall reduce it to his full effect; which when it is done shall make the grant good ab initio.

20 H. 7. Case  
Srat, Marc.

And if I make a Lease to A. for so many yeares, as I. S. shall name, or Grant such Liberties, as another Town hath, both these at the time of the Grant appear in Case to be made certaine, and the common Cases of Grants that take the perfection by Elections given by the party or by the Law to certain persons.

The same Books and reasons that prove that when the election creates the Interest, nothing passes till election, the same prove, that where no election can be, no Interest can arise.

Bullocks Case, 10 Eliz. Dyer 281. Feoffment of an house and 17. Acres, parcell of a Wast. the Feoffee, not his Heirs must make his election, or else the Grant is void, and 2 H. 7. 23. So Haywards Case. Co. lib. 2. 36. If I give the one of my houses, nothing passes till the Donee chooseth, therefore he must do it, his Executors cannot, 44 E. 3. 43. is a good Case: A. for sold his Woods excepting forty of the best Oakes at his choice, to be taken within two yeares; then the B. brought an action of trespass against the Vendee for selling them; he pleaded that the Plaintiffe delaying his choice, till the two yeares were almost expired, that he could forbear the selling no longer, but his two yeares would expire, and therefore required him to make his choice; but he refused, whereupon he chose forty of the best himselfe, and left them standing, and took the rest.

So note that the Vendee in this Case had no property, till election or default made by the Vendee, which was supplied and made certaine by the Vendee; and yet the Vendee, could not have made the choice in default of the Vendee till the time incurred so neere, that he must needs; And that must be put upon judgment of the Jury or Court, upon speciall Declaration of the time, and number of the Trees, and the like. But here it cannot change property presently of any Trees certain, because it is uncertaine which Trees may be spared, and which not, and diverse Trees may be spared and indifferent, whether these or those, and there is no person to whom it is given to determine, which may be spared, which not: But if the Grant had been of such Trees as I. S. should judge might be spared, it might have stood with his determination. Primo Maria, Dyer 90. A sale of Woods which may be reasonably spared 7 E. 6. terme that shall be to come after his death: uncertaine and apparent that at the time of the Grant it is not referred to certainty, 22 H. 6. a Grant to two, & hazed void.

But the Defendant hath pleaded not guilty, which he cannot maintaine un-

into the Trees were actually his, before he sold them; for if it had been but a warranty to sell, he must have pleaded it, and not pleaded not guilty.

Also he must have averred that they might have been spared, which is not pleaded, nor found by the Jury. And so the Defendant pleaded, Primo Mariae Dier 90.

Now though I am of opinion as before, that this last clause is void for uncertainty; yet I hold clearly that it reacheth not to the first clause of Grant, upon which I have argued and concluded for the Defendant, but looks back onely to the last clause beginning at *und cum omnibus aliis hofcis, &c.* which though it be frustrate, yet the first clause stands perfect of it self; for it is true, that if a Grant be carried in generalls, which of it self is not certain, if that by the other parts of the same entire sentence in point of description; or other declaration cannot be true; as in Doughtyes and Darringtons Cases before, or cannot be effectual, as in this conclusion of uncertainty, or be restrained by a Conclusion, as in Finches Case, Coke lib. 6. 39. mark the Sentence.

The Rent of twenty pound a year was granted by the Lady Finch to her issue, in these words, Out of the Manor of Eastwell, Otterplea, Potbury, and Kenon, and her lands lying in the Parishes of Eastwell, Westwell, and Challock, or elsewhere in the County of Kent, to the said Manor, or any of them belonging; clearly this charged no other lands in those townes, but such as belong to the Manor; for it is plainly one onely entire compacted sentence, so woven and interlaced together, as there is neither division in words, nor sense, and that is a joining of the sentence to good use, and not to avoid all.

Note, these Cases are of one entire and compacted sentence, and therefore one may overthrow or restrain another: but our Case hath two clauses that are clearly distinct.

First, a grant of all those his Woods standing upon his whole Manor, which answers the *Proponere illa*, being resolved thus; all those Woods which stand; to that clause, I joyne the viz. as an hand-maid as I said, though it be void.

Then comes the second clause, *und cum omnibus aliis hofcis, &c.* which in Law though it be governed by the first words of grant, yet that word of grant is respectively, as severall grants of severall things. And it is all one, as if he had said, he granted all the Woods growing upon his whole Manor; and he also granted all other his Woods that might conveniently be spared, &c. And in that Case of Rich it is granted, that if I grant a Rent in this tozin taking out of my Manor of D. and out of my Lands and Tenements in D. and S. and out of my Lands elsewhere to the said Manor belonging; that this middle clause stands in frame divided, that it shall charge my Lands in those Towns, though they be no part of the Manor; and yet that clause is inclosed with the Manor, both before and after; much more here, where the first generall clause stands cleare by it self, and the second clause under the *und cum omnibus aliis* is a new addition, and of other things than were before granted, and hath his own conclusion, with convenient, &c. attending upon it.

Edward Topfall and others, vers. Ferrers.

Trinit. 15 Jac. Rotul.

Libel, Eccl.

Edward Topfall Clerk, Parson of Saint Bartholoms without Aldersgate; and the Churchwardens of the same, libelled in the Court-Christians, against Sir John Ferrers Knight; and alleged that there was a custome within the City of London, and especially within that Parish; that if any person be within that Parish, being man or woman, and be carried out of the same Parish, and buried elsewhere, that there ought to be paid to the Parson of this Parish, if he be buried elsewhere, in the Chancell so much, and to the Church-wardens so much, being the same that they alleged, were by custome payable unto them, for such as were buried in their own Chancell; and then alleging that the wife of Sir John

Custom of the Parish, that a Passenger dying there, though buried elsewhere.

Ferrers

Ferrers died within the Parish, and was carried away and buried in the Chancel of another Church, and so demand of him the said sum. Whereupon, for Sir John Ferrers, a Prohibition was prayed by Serjeant Harris, and upon debate it was granted; for this custom is against reason, that he that is no Parishioner, but may pass through the Parish, or lie in an Inn for a night, should be forced to be buried there, or to pay as if he were; and so upon the matter to pay twice for his buriall.

Trespasse.

Plant versus Thorley.

Hil. 14 Jacobi, Rotulo 861.

Staff.

Seat, of Jeof-  
 failes, verdict  
 helped thereby.

PLANT brought a Trespasse against Thorley, for taking and carrying away a hundred loads of Turfs at Leake; the Defendant pleads, quod locus in quo (whereas there was no place assigned) was two Acres, called Black-acre in Leake, which was his Freehold, and that he digged the Turfs there, and took them away prout, &c. The Plaintiffe says, that locus in quo, was a pece which contained twenty acres in Leake, alia quam, &c. and the Defendant quoad aliquam transgressi in pred. 20. Acriis, not guilty: whereupon issue was taken and found for the Plaintiffe: And it was moved in Arrest of Judgement, that this was no issue; for there was no twenty Acres, nor place certain in the declaration: yet the Court gave judgement for the Plaintiffe. For though it were not in the Declaration, yet it was no plaine departure from the Declaration; for both parties were agreed, that the Trespasse was done at Leake; so that the assigning of a more particular place in Leake stands well with the Declaration, and doth but reduce it to more certainty, and is a supply of that, that might have been well laid in the Declaration. And so it is not a Verdict out of the matter, and so no issue, but is a Verdict helped by the Statute of Jeoffailes.

Herriot.

Shaw versus Tayler.

Mich. 14. Jac. Rot. 2387. or 3287.

Herriot ser-  
 vice.

Nulla habuit  
 animal.

THE Defendant made Abowry for Herriot service; the Plaintiffe pleaded in Barr, that the Tenant at the time of his death, nulla habuit animalia; and the Defendant demurred: And it was adjudged for the Plaintiffe, because the Abowry was insufficient; for that it did not set down in certain, what the Herriot should be, scil. Beast, or other thing. Quære, if it were expresse the best Beast, either in Case of Tenure, or Custom, if the Tenant have none with-out hand.

Note no such thing in rerum natura, no Guard, if there be no Feit, or be of full age.

Prohibition.

Hawles and Bayfield.

Hil. 13 Jac. Rot. 312. B.R.

Agreement.

Agreement  
 verbal to pay  
 money in dis-  
 charge of  
 Tythes.

IT was reported in the Common-pleas this Terme, Trinit. 15 Jac. That in the Kings-Bench in the Term and Roll aforesaid between Hawles and Bayfield, a Prohibition was awarded upon this sumise, that between the Lord Shandois then seised of the Manor of Blunfden in Wiltshire, and the Defendant then Parson of Blunfden; there was a concord and agreement, that the Lord Shandois and his Farmers of his said Manor, should pay unto the said Parson, so long as he should remain Parson, such a summe of money in full satisfaction of all Tythes; and that in consideration thereof, they should hold the said Manor discharged, &c. and upon Demurrer it was adjudged for the Defendant, and a consultation awarded.

Steward



**Steward versus Butler.** Case.

Tr. 14 Jac. Rot. 769.

James Steward brought an action of the Case against Bishop, for saying of him, James Steward Innuendo, &c. to in Warwick Gaol, for stealing of a spare, and other Beasts; and after a Verdict for the Plaintiffe, upon divers motions in Arrest of Judgement, the whole Court gave opinion seriatim, that the words would not beare Action; for they doe not affirm directly, that he did steale the Beasts, as if he had said that he stole them, and was in Gaol for it; but they do only make report of his imprisonment, and the supposed reason of it; and it may very well be, that the Warrant of Mitterius was for stealing especially, as it is the common form of making of the Warrants of the Prisoners for the Justice of Assize, and the like.

Action for words, bee is in Gaol for stealing.

**Gage's Case.**

Gage an Attorney of this Court, sued as Administrator by Will of pithi- Judge, and it was moved by Chibborn, That they ought to sue by original; quod fuit concessum, and therefore he took out his original, Pasc. 13 Jac. the Defendant appeared, and the like opinion was given this Term; and converso, for Drury who was sued as Executor to his Brother, by being an Attourney.

**Bell against Harly and his Wife.** Wast.

Tr. 14 Jac. Rot. 1840.

Richard Bell brought an Action of Waste against Harly and his wife; and after issue joined at the Nisi prius, the parties appeared, and verdict was given for the Plaintiffe, and now at the day in Benke, Henden was moved that the wife might be received, but it was rejected as a strange action.

Receipt

**Swinnerton against Miller.**

Hil. 14 Jac. Rot. 2049.

Replevin.

A Replevin between Swinnerton Plaintiffe, and Miller Defendant, upon location of motion in arrest of Judgment, it was resolved by the Court, that whereas one Robert Winniffe was lessee of a Copp-hold of the spawes ofington, and by license of the Lord demised the same by Indenture to the Plaintiffe for twenty years, rendering twenty five pounds per Annum; that he said Robert Winniffe surrendered the reversion of the one moiety of the same Copp-hold to the use of Nicholas Winniffe, to which he was admitted, and then surrendered the other moiety to one Mary the Wife of John Miller, who was admitted, and the Defendant as Bailfe to the said Mary and her husband to half the Rent as belonging to the reversion of the half waste Confinance. It was resolved by the Court that the surrender by the name of a reversion was good this in case (though the Lease were not made by surrender, which had been directly derived and that according to Customs, out of the customary duty) but by Indenture) for still it is the Lease of the Copp-holder, and not of the Lord, and yet perhaps if the Copp-holder should forfeit his estate, the Lord would stand against the Lord in this kind of demising by licence. Also it was holden clear, that the Rent was to be divided by halves according to the halves of the reversion.

Lastly, the Court was of opinion, that there needed no Attournement upon the surrender made of the moiety of the reversion by Robert Winniffe unto Nicholas, because it passeth not by way of Grant of reversion and Attournment;

but there must be an admittance of the Law; and when that admittance is given, the estate is settled, and there is no means in Law to compell the Lessee to Attourn. And the Admittance is a kind of Act in Law, and puts the Estate into the party in a sort in the poss. But I am of opinion upon the reason of *Mallories Case*, Co. lib. 2. that there shall be no Entry for condition broken in such a Case without Attournment. But indeed, it is not within the Stat. of Conditions.

### Pickavers Case.

Stat. 23 H. 8.  
cap. 9.

In the Case of one Pickaver, it was resolved by the Court upon the Stat. of 23 H. 8. That if a Bishop, Archdeacon, or other Ecclesiastic, within the Province of Canterbury be both and so the Jurisdiction devolved to the Metropolitan, that he must hold his Court within the inferior Diocese, for such Causes, as were by that Law to be holden before the inferior Ordinary. And I moving that as my opinion, it was said by the Prothonotaries, that it had been so formerly resolved.

Obligation.

### Andrews against De-la-hay.

Mr William Andrews brought a Bill of Debt, of ten pounds against De-la-hay an Attourney, and counted upon three severall Bonds of five Shillings a piece; and upon the Oyer of the severall Conditions, it appeared that one of the summes in the condition, was payable after the Bill exhibited, and issue was joined upon conditions performed, and verdict given for the Plaintiff, and entire damage and costs assessed; and per Cur he cannot have judgment in sum as it is found; nevertheless upon Release of damages and costs, judgment was given for the two first Bonds only; for though the Bill were an entire summe, yet by the Court, it appeareth that they were as severall demands; so the whole suite is not falsified, by the Plaintiffs himself, for it is as severall demands and suits: Tamen Quere, if it had been so by Originall.

Debt.

### Bird against Culmer.

Bird brought an Action of Debt against Culmer an Executor, upon plainement Badministrare, the Plaintiff replied that he had Assets; and the Defendant, relicta verificatione cognovit Adhuc non, nec quin ipse detinet; the Debt of And judgment was given pro Querente de bonis Testatoris which was entered Hill. 12. Rot. 203. And it was noted by Richardson, that the Confession should also contain, that he had goods sufficient, &c. And prayed that that might be added to the Entry, but the Court refused to doe so; for indeed the confession naturally can extend no further, then to the Court which is of the debt, and not of the Assets. Yet if the Defendant will confess more he may, and there are Entries both ways. Note that in this Case he had pleaded plene &c. And the other had replied assets; And then he confesses, leaving (which may be taken dissolving) his Plea of plene administravit.

Obligation.

### Earle and Tuck.

Condition to  
make composition  
for Land.

In a debt upon an Obligation, with condition that if the Defendant should make composition with one Earle for lands, &c. Then he should pay the Plaintiff thirty pounds: The Defendant pleads that he made no composition: The Plaintiff replies, that the said Earle did grant unto the Defendant, a rent charge of five Shillings in fee, in satisfaction of his Title, &c. Which the Defendant did accept in satisfaction, &c. There must be added for soyn, and so he made composition. The Defendant protestando that Earle non concessit &c. pro placito that the Defendant did not accept it in satisfaction &c. And it was

golden

When a good plea, for it is no Composition without consent which depends upon the acceptance, and the grant is at the most but argumentative.

*Flood versus Knight.*

**R**obert Flood, informed against Richard Knight, for using a Trade not being Apprentice.

Information using a Trade not having been an Apprentice.

*Lovedens Case.*

Debt.

**A**ction of Debt was brought against Loveden and his wife, for the Refusal of the wife; and the husband would have appeared by Super-ideas alone; but the Court was resolved, that either both must appear, or both be out-lawd. Wife recusant must appear with her husband.

*Coachman against Halley.*

Hill. 14 Jac. Rot. 2167.

**D**ebt by Coachman against Halley, Baptiste of Ashford, for an escape. And counted upon a Recovery, in the Court of Ashford. The Defendant pleaded Nul tiel Record; and now in the Record certified, there were divers differences in the continuances, and in the process, and yet because the Plaintiff Count and judgement certified, agree with the Declaration, judgement was given for the Plaintiff. Record certified.

*Copley against Collins.*

Mich. 14 Jac. Rot. 3444.

Prohibition.

**I**n prohibition it was resolved, That the six months for proof of the surmise, shall not be counted by twenty eight dayes to the month, but according to the Calendar. Count in a surmise by the Calendar.

*Swaine against Holman.*

Tr. 14 Jac. 755.

Wast.

**A**ction of wast between Swaine and Holman of Lands in Com. Dorset. The parties were at issue upon a surrender made in Middlesex. The question was how the Writ of Wast shall be awarded, which must be per visum iurorum.

*Case.*

Case.

**A**ction upon the Case for calling one Bastard, the Defendant justified that he was a Bastard, and it was awarded that this should be tried per pais, and not by the Ordinary. Bastardy shall be tried by Jury in Action upon the case.

*Points against Gibbon.*

**I**n a Writ of Partition upon the Statute, by Points against Gibbon, being within Age, the Defendant was deposed his Age.

Partition.

Age is not grantable in partition.



Trespasse.

Wheatley against Stone.

Pasc. 14 Jac. Rot. 545.

London.

**W**Heatley brought an Action of Trespasse against Stone, in the Kings Bench, and declared that he levied a plaint of Debt in the Counter of London against one Watkins, and upon Proces he was arrested by one West a Serjeant, and that Stone, vi & Armis did rescue him, &c. Whereby he lost his Debt; upon issue not guilty, and veridia for the Plaintiffe, judgement was given et quod defendens capiat; whereupon error was now brought in the Exchequer Chamber, and the judgement was affirmed; for though the nature of the Action properly is upon the Case, as touching the Plaintiffes losse or damage of Debt, yet being done with force, and that force being done, though not to the Plaintiffe himself, to the Serjeant, who was Spinifer as well for him, as to the Court; he may make his Action vi & Armis: And the like President was shewed out of the same Court, M. 34. & 35. Eliz. Rot. 169. between Margaret Astell, and Hugh Ridge; and another of the same M. 42. 43. Eliz. Rot. 468. between Andrew Pawling, and Robert Marriot, and on the other side Pasche 14 Jac. Rot. 564. London: Robert Spear brought an Action upon the Case, upon the like arrest and rescue, vi & Armis expressly, and the judgement was given in misericordia. And that being also brought before us by Error, this terme wee affirmed the judgement; and the like had been, Hill. 6 Jac. Rot. 722. in the Kings Bench, and affirmed upon a Writ of Error; for it was resolved that the Case, though the rescue were laid vi & Armis, would beare either Trespasse, vi & Armis, or Trespasse upon the Case. But the Plaintiffe must shew that he follow his originall, if it be by Writ; for if that be vi & Armis, or upon the Case, the judgement must be stable.

And so must it be in a Bill in the Kings Bench. But if the Bill be Trespasse generall, neither saying vi & Armis, nor upon the Case specially, he may use it to either.

Case.

Slowley against Eveley.

Tr. 12 Jac. Rot. 983.

Non suite in part.

**S**lowley brought an action of Trespasse against Eveley in the Kings Bench. For beating and imprisonment of him, and had judgement; and upon a Writ of Error in the Exchequer Chamber, the Court upon occasion of an Error assigned, took this difference; that where a man hath a personal Action against two Defendants, if they plead severally, and he be Non-suite against the one, before he hath judgement against the other, that he shall be barred against both; for it works in the nature of a Release of the whole. But where there is but one Defendant and he pleads to one part in issue, and to the other demurrs, the Plaintiffe may be Non-suite for one point, and proceed for another.

Case.

Sydenham against May.

Mich. 13 Jac. Rot. 347.

Action for words not altogether the same.

**S**ir John Sydenham brought an Action of the Case, against Timothy May Clerk in the Kings Bench for these words, (If Sir John Sydenham might have his will, he would kill all the true Subjects in England, and the King too) and he is a maintainer of Papistrie, and of rebellious persons. The Defendant pleaded other words absque hoc, &c. And the Jury found that he spake these words, viz. I thinke in my conscience, that if Sir John Sydenham might have his will, he would kill all the Subjects in England, and the King too, and he is a maintainer of Papistrie and rebellious persons; and if upon the matter he be guiltie, in speaking the words, in forma qua, in the Declaration then, &c. and if not, &c. and judgement was given for the Plaintiffe, and now upon a Writ

Writ of Error in the Exchequer Chamber, the Court inclined against the Defendant; for the matter is in effect the same, and the forme must be understood, the Essentiall forme, not according to every word: Yet Pasche 16 Jac. We inclined that either of these words would bear Action, but the words found were not so absolute as the Declaration, neither moved credit in the hearer so fully, which is the force of a slander; and then they are not the same words in force and effect; as if the words were said, I know him to be a Thiefe, and it were found, I thinke him to be a Thiefe.

### Howard against Bartlet.

Vilcount Howard was seised of the Manor of Stockwood in Dorset-shire, whereof the Custome was, that the Coppyholders for lives, their widows should enjoy during their widowhood, their Customary lands, whereof their husbands died seised. The Vilcount, Anno 5 Eliz. granted a Customary Tenement (that Manor) unto Iohn Bartlet for life by Coppy, and 19 Eliz. conveyed the whole Manor to Winterhay, who the same years conveyed the Inheritance, and freehold of Bartlets Tenement for money, paid by Bartlet to Whitby and others and their Heires and Assignes during the life of Iohn Bartlet; the remainder to Ellen then wife of Bartlet, the Remainder to Iohn Bartlet himselfe in Fee.

The same Iohn Bartlet, 28 Eliz. did grant his sayd remainder in Fee to William his soune and his heires to whom Whitby and the rest released. Then William Bartlet having issue William. (who is now a Ward) died; and then Ellen the wife of Iohn Bartlet died; and Iohn Bartlet married againe one Frances, and died seised of his Customary estate 14 Jac. and then Frances his wife entered.

Upon this Case it was resolved by us, three Justits, that Frances was to enjoy her widowes estate, in this Land. For first, it was clear, that the Customary estate of I. Bartlet remained as it was during his life, not extinct, nor altered by the purchase of the Fee-simple, which during his life was in others, not in him; whereof it followes by consequence, that all Customary incidents to such a Customary estate remaine, whereof there is one, which is as an Exemption, which by the Custome and Law growes of it selfe out of that estate, even as a descent should have done; if Bartlet had been a Coppyholder in Fee, and the freehold had been granted to another in Fee. But it so much as an admittance only were requisite before her estate could vest in her, it were dangerous, as if it were a Dower which could not be had but by suite; for that were lost, because the Customary Court that should relieve her is gone as to her, for her estate is utterly estranged from the Manor: But now this estate is as it were a part of that of the other, and is cast upon her, and vested by Law. And Pasche 16 Jac. upon a tryall in ejectione firmæ, between Lessee to the widow of one Walter Rennington claiming a widowes estate in land in Southsemy in Gloucestershire, against ——— For Sir Edward Whithpole: it fell out that she was in deed married to Rennington: and they cohabited; but she being free to his former wife, he was questioned, as for an incestuous marriage, and put to Penance by the high Commission Court, and bound from her company, and she died: and then the woman came into the Court to pray her widowes estate, and was denied. And we resolved, that her widowes estate was due to her, in as much as she was never divorced à vinculo, though there were cause.

Next, we held that the Action was maintainable, against the Lord without admittance, for the reason in the former Case. And Warburton and Hutton, did also rely upon the refusal to admit, in which Case they thought the Law should supply the admittance.

## Ravishment.

## Bruton against Morris, and others.

Star-Chamber.

**I**ohn Bruton exhibited a Bill in the Starre-chamber against Edward Morris, and others, & complained, that he having one only daughter of the age of twelve yeares, or thereabouts, and having in lands and goods to the value of five thousand pounds; the Defendant Morris did cause his daughter to be allured from his house in Southwark downe the Thames to see a Ship, and having her so aboard, afterwards by force and threats carried her into Suffolk, and there married her.

Vpon the Stat.  
3 H. 7 cap. 2. of  
taking away  
an Heire.

Now the truth was, that this Bruton had also a sonne, though it were not so laid in the Bill, so that this daughter was neither heire apparent to her father, nor had lands or goods: whereupon question arising whether this case were within the Statute of 3 H. 7. cap. 2. and so felony and not examinable by this Court: It was ordered, that the chiefe Justice and I should consult with all the Judges, which we did: & upon consideration of the Statute and view of Precedents of former Indictments in the Kings Bench, we resolved that this case was not within the Statute; for though the words of the Purview seeme generall to all women, taken unlawfully against their wills, and that this Spaw, though she were first trained out with her consent, yet was afterwards by force carried away, which was as a forcible taking then begun, because she was before in her owne power: It was considered that the preamble of the Statute could not be thought to be idle, but meant to restrain the Purview to the particular cases of the preamble in the enumeration of the women, and their estates and conditions; and also the motives and ends of their taking, that is, that they should be maides, widowes, or wives, that had substance in goods or lands, or should be heires apparent; that the motive should be lucre, and the end to marry or deflowre; and the Purview following, that what person or persons should take a woman so against her will unlawfully, &c. it was conceived that this word (so) did implicitly binde up the preamble in the Purview; for else the word (so) were idle, and might be spared, if it did not include the motive and end of the action, which is a part of every action, as being the cause of it, which in this case, are lucre and lasciviousnesse. And that was also conceived to be the meaning of the law, as being like to be the Common case; for men will not commonly steale women that are nothing worth. Yet it was objected, that by this construction the taking of a maid inheritable to twenty Acres of land should be felony, and the taking of a daughter of the greatest Peere of the Land should be no felony. And also that there could be no lucre in stealing of another mans wife, neither could the ravisher marry her. Also the Proviso in the end, is, That the act shall not extend to any person taking away any woman, claiming her as his Ward only or Bondswoman, which seems to respect only the taking without the word (so.) There were also some Indictments found in the Kings Bench; One, North'con. Pas. 19 H. 7. against one Higford and another Noiff. Pa. 6 H. 8. against one More, & another Kanc. Hill. 3. & 4 Phi. & Mar. against Palley that spake neither of lands nor goods nor heire; but on the other side aswell those Indictments as all other that were found, did recite the preamble of the Statute, and the rest, being seven or eight, did all lay the women taken so be heires, or possessed of lands or goods. And one Indictment which was Noiff. Pas. 13 H. 7. against one Sturges for the taking of Agnes Hopson was put sine die for insufficiency, and one fault was entered, because there was no mention to what intencion he took her, whether it was to marry her, or to deflowre her.

And another Ebor. Hill. 3. & 4 Phi. & Mar. against one Thompson, for taking Margaret and Margerie Button was also put sine die for insufficiency, and one fault was entered, because it was not said that he did indeed marry, or deflowre them, or either of them prout per tenorem Stat. predict. fore deberet. Also Hill. 26 Eliz. my Lord Anderson in his booke of Reports hath it thus: It was agreed by the Justices, that if a woman be taken against her will, and menaced to



to contract her ſelf in marriage, but yet is not married indeed, that this is no felony; but if ſhe were married, or deſiled, if were felony; for though the body of the Law ſay that ſuch a taking ſhall be felony, yet it ſhall be apayed by the preamble, which makes the marriage or deſiling materiall: And one other Injoynment, Inſula Elienſi in Comit Cantuari: Paſ. 35 Eliz. (diſcharged by pardon in Parliament) againſt William Harrison for taking ec. Anne Lewis the wiſe of Thomas Lewis at Ely, ſhe being ſeiſed of lands in Ely of twenty pounds per Annum, and that one David Byre knowing her to be ſo unlawfully, and feloniously taken away, the ſame Anne by the procurement of the ſaid Harrison at Ely aforeſaid, took her to wife.

Now ſince the marriage or deſiling is made a neceſſary part of the Injoynment it followes, that the Wordie of ſo taking is expounded and reſtrained by the preamble, and the motive offence is hereby incorporate into the Act of taking, as being a precedent and a ſufficient cauſe of it, then the marrying and deſiling, which is an accident following after the Act, and perhaps was not purpoſed when he took her away.

Quere, if the taking, and the lands, and the marrying, or deſiling were in ſeverall Counties; for it is felony compoſed of all theſe three things, as a murder is of the ſtroke and death.

*Davison againſt Barber.*

Hill. 14 Jac. Rot. 2318.

Information

Edmond Daviſon qui tam &c. ſued an Information in the common Pleas againſt William Barber, for exerciſing occupationem De les Bakers, by ſelling moneths in the City of Norwich, upon ſuſe not guilty, found for the plaintiff, Richardſon excepted in arreſt of Judgment that it ſhould have been in the occupation of a common Baker; but that was not regarded. Another exception was taken, that by the Statute of 5 Eliz. the forfeſſure ariſing upon offences committed within Cities & Towns incorporate, is given to the ſheriff of the City or Town incorporate, whereof the conſequence was urged by me, What if the claule were ſo to be underſtood, then this Information could not ſtand, which was for the King and the Informer: And this doubt depends upon two branches of that Statute, The firſt ſomewhat before the end of the Statute after all the ſtatutes given in theſe words: That the one halfe of all forfeſſures and penalties mentioned in this Statute, other than ſuch as are expreſſly otherwiſe appointed ſhall be to the Queens, the other halfe to the Informer.

Stat. 5. Eliz. whether it gives the penalty to Cities and corporate Towns.

The other claule is nearer the end in theſe words, That all manner of Amerciaments, Fines, Issues, and Forfeſſures which ſhall ariſe by reaſon of any offences, or defaults mentioned in this Act, or any branch thereof within any City, ſhall be levied to the uſe and maintenance of the ſame City, in ſuch ſort, as any other Amerciaments, Fines, Issues, or forfeſſures have been by reaſon of any grant made by the Crowne to the ſame City, any claule in this Act to the contrary notwithstanding. Hereupon I was of opinion, that the word (forfeſſure) in this latter claule was not to be underſtood of the maine penalties of the Law, for two reaſons.

First, becauſe it was penned beginning with Amerciaments, &c. which imports the forfeſſures of the like, or leſſe nature: Againſt, that it appoints them to be levied in ſuch ſort, as other Amerciaments, &c. granted to ſuch Cities, are to be levied, which are of Record, and due as ſoon as they are impoſed, and want nothing but the levying. Now Fines, Issues, and Amerciaments are often granted to Cities; and yet that could not extend to the like growing upon ſuits, upon offences made by new Statutes. Note, thoſe are not due till there be a conviction; ſo the queſtion is of the ſuit, not of the levying.

But no City hath or can have Grant by Charter of any penall Law: And where it was urged, that the former claule did except from the Queens, The penalties otherwiſe appointed which muſt needs be underſtood of theſe: Where

is in the Statute 50 pound forfeiture given against him that departs without licence out of a town undertaken to him from whom he departs. At Coventry the summer Assizes 17 Jac. Hobart Justice of Assize there advised Stapleton to give judgment for the informer in the Shrewsbury Court there.

A another exception in this case was, that this Information ought to have been in the Quarter-sessions, Assize of Assize upon this Law by the expresse provision of the Statute of the 31 Eliz. which I hold to be plainly so; for that Statute hath one general clause; That upon penall Lawes the offence shall be laid to be done in the County where in truth it was. A second clause there is, exempting some offences out of that generall, which may still be laid in foraigns Counties. Then folloves the third clause, which provides expiely that for the Statute of unlawfull games, Wopes and Apprentices shall be sued and prosecuted in Sessions & Assizes; or inquired heard &c. in an Assize &c. or in the Kete, &c. Note the reason and intent of the law to ease the Subject diversly, and most in these petty offences: Note the difference of words, in the first clause, the offences shall be laid; in the third clause shall be sued and prosecuted, &c. and not in any wise out of the same County; but it may be some question whether those petty offences being committed in Midd. may not be sued in the Courts of Westminster sitting in Midd.

Debt.

Debt counting  
upon parcels.

## Revell against Gray.

Revell brought an Action of Debt against Gray, and his wife, for threepounds and eighteen shillings, and counted for thirty nine shillings, upon a contract of the twives, Dum sola fuit; and the other thirty nine shillings, upon an in simul computaverunt, with Gray the husband only, and after this nihil debent, found for the Plaintiffe, judgement was stayed.

William S. Andrews against the Bishop of York, Mary Countesse of Shrewsbury, and one Hacker.

Mich. 15 Jac. Rot. 32.

Assize of Darr.  
presentment  
hanging a  
Quare Impedit.

William S. Andrewes brought a Writ of Assize of Darrain presentment, against the Bishop of York; Mary Countesse of Shrewsbury, and one Hacker; the Bishop made default: And the Countesse, and Hacker pleaded in Abatement, that the Plaintiffe before this Writ purchased, brought a Quare Impedit against the same Defendants and selves all certaine, which remains undetermined; and abetres, that they are both of the same Abeyance: And upon Deniall the Writ was abated by judgement.

Judgement.

Case.

## Male against Ket.

Hil. 14 Jac. Rot. 150.

Action for  
words of Pety.  
larceny.

Male brought an Action of the Case against Ket, for saying that he had stolne his Coine out of his Barne. After a verdict it was said, it might be, the Coine was not worth a penny: yet judgement was given for the Plaintiffe; for it is felony, though it be not capitall.

Case.

## Chamberleyne's Case.

Trin. 15 Jac. Rot. 1952.

Amendment  
of the Record  
by the book  
of Office.

Chamberleyne brought an Action upon the Statute of Hue and Cry, and after Clause joyned and entered where the Record was made, that the Robbery was done 30. Oct. It was ordered by the Court to be amended, and made 30. Septem. upon the Oath of Thurston the Attourney, for the Plaintiffe, that the book of the Office, was so and shewing it.

Iones againſt Iones.

Prohibition:

**M**otion was made for a Prohibition between Iones and Iones, upon the Citation out of the Stat. of 23 H. 8. for being cited out of the Diocesse: And the case was, the Chancellor of the inferior Ordinary, did make request to Doctor Donne Deane the of Arches, to take the Cause to his hearing; and the reason given by the Chancellor of the sending it up was, that the Cause (being indeed a cause of Modus Decimandi) was so difficult, that the Plaintiffe could have no sufficient Council there for that cause.

Now the Question was, whether this transmitting of this cause were warranted by the exception in that Statute: which exception is of two sorts. the one for speciall cases, there particularly expressed, (whereof this is none) the other a generall clause thus: That in case, that any Bishop or any other inferior Judge, having under him jurisdiction in his owne right and title, or by commission, make request or instance to the Archbishop, or other superiour Ordinary Judge, to take, treat, examine, or determine the matter before him, or his substitute; and that to be done in Cases only where the Law or Bill or Canon, doth affirme execution of such request, or instance, or jurisdiction to be lawful or tolerable, upon paine to forſeit, &c. double damages and costs to the party for his vexation; and also ten pounds; one halfe to the King, the other halfe to him, that will sue for the same.

Hereupon we sent for Civilians, and there came for the Defendant Doctor Talbot and another Talbot said, that by the Canon Law in the beginning, there was but one Bishop, who had sole jurisdiction, and was the immediate Ordinary throughout: Afterwards, there were Suffragan Bishops made under him, which brought in a restraint of the Archbishops in their Diocesse; but in speciall Cases which agrees with our Law, that an Administration granted by the Archbishop, is but voidable.

Then he said, that the jurisdiction of the Archbishop is opened (for that is his phrase) sometimes by himselfe, nolente Ordinario, as in the Case of his visitation. And by the party in default of justice in the Ordinary, as by Appeal, or Nullities. Again, it is opened by the Ordinary himself, without the party or Archbishop; as where the Ordinary sends the cause to the Archbishop.

Panomitan. Archiepiscopus est Ordinarius totius Provincia; non tamen habet exercitium nisi in Casibus; and sets downe many Cases: And amongst the rest, his Quando refertur ad eum questio, vel tota Causa. And Hostiensis, cap. Pasto-Hostiensis, de Officio Ordinarii. Certum est quod Metropolitanus, sive ipsum dicemus Ordinarium totius Provinciae, sive non, non potest exercere Jurisdictionem suam in suorum Suffraganeorum subditos, nisi in Casibus sequentibus, and reckons 21 Cases.

- 1 Ubi ab Ecclesia sua Metropolitanus discrepat in Divinis,
- 2 Ubi subditus conqueritur de Episcopo.
- 3 Si appelletur ad ipsum,
- 4 Quando inter Episcopum & alium criminalis Questio agitur,
- 5 Ratione delicti commissi in sua Diocesi.
- 6 Quando praecepit subditi Episcopi quem reperit iuste excommunicatum, quod eidem Episcopo satisfaciatur, & subditus non satisfacit.
- 7 Ratione rei sitae in sua Diocesi.
- 8 Quando ad eum refertur Questio per consultationem,
- 9 In his quae tangunt communiter totam provinciam,
- 10 Quoad congregationem Concilii Provincialis.
- 11 In Injuriis notoriis sibi, vel suis irrogatis,
- 12 Quando Episcopus negligens est in Iustitia facienda.
- 13 Quando Canonici in contemptum Episcopi abstinere a Divinis;
- 14 Quando notorium est sententiam Episcopi non Tendere.
- 15 Ratione Visitationis annuae.



16 Potest per totam provinciam indulgentiam facere.

17 Si non superint Canonici idonei vacante sede, custodit bona Episcopalis mensa.

18 Ratione Privilegii sibi concessi.

19 Ratione consuetudinis.

20 Si inter Episcopum & Capitulum suum fiat permutatio.

21 Quando Episcopus, vel quia recusatur, tanquam suspectus, vel alia de causa mittit ei partes; & refert totam causam; *whereof the eight case is, Quando ad eum refertur, Quæstio ad consultand. And speculator titulo de Relationibus perag. Quando generaliter Iudex potest facere Relationem, quodocunque sibi videbitur expediens, sc. ante litem, in medio litis, vel quodocunque.*

Baldus.

And Baldus being a Civilian, writing after Hostiensis, referres himself to him; and saies, Archiepiscopus est Iudex totius Provincia; tamen Jurisdictio sua est signata, & non aperitur nisi ex causis.

And Talbot said resolutely, that though the Canon-law restrain the Archbishop to call causes from the ordinary nolenate, ordinario but in the 21. cases, yet the law left it in the absolute power of the Ordinary, to send the cause to the Archbishop absolutely at his will, without assigning any speciall reason; and therein Hostiensis & Dominicus de foro competenti and other Authors doe agree And this Doctor Duck comming to us another day with Talbot yet being against him, did confesse the Ordinary might consult with the Archbishop at his pleasure, without limitation. And they agreed, that the Cases allowed by the Canon-Law to the Archbishop, to call causes from the Ordinary nolenate to his own hearing, were more then this Statute doth allow. And touching the troubles of the subject Doctor Talbot cited Baldus Causa 3. Qu. Sexta, cap. penult. ex Synod. Roman. Neminem oportet exire de Provincia ad Provinciam, vel de Civitate ad Civitatem nisi ad relationem Judicis, ita ut Actor rei forum sequatur.

Baldus.

Now to expound the Statute thus, That the Ordinary may at his will and pleasure, send the subject from one end of the Kingdome to another without cause, is both against the letter of the Statute, and eludes it utterly.

First, the purpose of the Law, was to provide for the ease of the subject, more then for the jurisdiction of the Ordinary; which appears in that there is Action given to the subject, and penaltie to the King for his violation, but none to the Ordinary. Again; the Archbishop by Statute is restrained to two Cases of necessity, much fewer than he had in his power before, nolenate Ordinario, which shewes that they regarded the subject more then their jurisdiction.

And this very clause of referring, after it begins with referring generally, it checks it with this [that to be done in Cases only, &c.] which were aaine correction if it left it as generall as before, that is, if it were lawfull or tolerable in all Cases without cause.

And no doubt the Statute was not made without advice and hearing of the Canonists, and therefore cannot be supposed to be so ignorantly penned; and therefore this Case concerning so much the ease of the subject, deserves much consideration.

In this Case in question, it is doubted whether the forme of the Statute be well observed, the referring being from a Chancellour to a Delegate, and not from Bishop to Bishop.

Quære, if an Archbishop calls a cause unto him, that is none of the Cases within his power, whether the inferiour Ordinary have any remedy against him, or can recall it by the Canon-Law, or whether the Defendant may plead it to the jurisdiction.

If a Peculiar be subordinate to the Bishop, then he cannot referre a cause to the Archbishop; but to the immediate Ordinary, as an Archdeacon or Commissary must doe; otherwise it is, if the Peculiar have his immediate resort to the Archbishop.

But if the peculiar be free by a generall exemption, from all ordinary jurisdiction (which was common in the case of Monasteries, both by the grants of Kings

and

and Popes) then the caſe muſt be remitted to the King, as Appeals muſt al-  
 ſo be in ſuch caſes; and ſo it is provided by the Statute 25 H. 8. cap. 21.

Note, that a Prohibition lies upon this Statute; becauſe it hath words pro-  
 hibitory, as well as penalty annexed, for breaking the Prohibition. Otherwiſe  
 it had been, if the penning had been thus only: If any man cite another out  
 of his Diocceſſe he ſhall forfeit ten pounds.

Agar againſt Liſle.  
 Mich. 11 Jac. Rot. 318.

Tro. and  
 Converſion.

Agar brought an Action of Tro. and Converſion againſt Liſle of a Colt, and  
 Alaid it apud Caſtrum Ebor. The Defendant pleads, that the Biſhop of  
 Durham hath a yearly Fair primo Junii at Darne-ton in Com. Durham, and  
 ſeth Toll there, and ſeth what; and ſo non-payment had uſed to diſtrain, &c.  
 and ſheweth that the Plaintiff had bought Sheep of one, and Colves of another,  
 and that this whole Toll came to ſo much; and that the defendant, as ſervant &c.  
 had demanded it, and upon a reſuſal, took the Colt and detained her for the Toll;  
 which is the ſame Converſion abſque hoc, that he was guilty apud Caſtrum  
 Ebor. or elſewhere, with-in the County of York, or at any time beſore the ſaid  
 firſt day of June, &c.

Whereupon the Plaintiff demurred in Law, and ſhewed for cauſe, that there  
 was Converſion confeſſed; and therefore no anſwer to the Action; but he  
 ſhould have pleaded not guilty. And being now moved this Term Mich. 13.  
 Jac. Harris ſaid that it was the common experience, that the Detainer of goods  
 from an owner after request is allowed for a ſufficient evidence to maintain  
 a Converſion: whereunto I anſwered, that though legally it were not a Con-  
 verſion; yet in that caſe it was reaſonable to allow it for an evidence to prove  
 a Converſion: becauſe if you have goods of mine lawfully by finding or Buil-  
 unt; yet when I require them of you, you can no longer lawfully hold them; and  
 therefore when you ſtill detain them from mee, it argues, that you claime them  
 as your owne, and ſo uſe them.

Diſtreſſe makes  
 no Converſion;  
 but unreaſon-  
 able detainer  
 doth.

But in this caſe it is otherwiſe; for here he hath not only a lawfull cauſe to  
 take the Colt, but as lawfull a cauſe to detain it, againſt demand, as a diſtreſſe  
 in the Toll paid; and yet he denies not the Plaintiffs property; nor doth any  
 thing againſt it; and ſo it was adjudged for the Plaintiff in this caſe.

Freestone againſt Bowyer.

Battery.

Freestone and his Wiſe brought an Action of Battery, and wounding of  
 the Wiſe in Com. Salop. againſt Bowyer, who pleaded a juſtification, by  
 warrant of the Sheriffe of Worc. & mollior impoſuit manus, &c. abſque hoc  
 good eſt culpabilis in Com. Salop, but anſwered nothing to the wounding: And  
 verdict was given for the Defendant and judgement; becauſe it was but a diſ-  
 continuance upon the point of wounding, which is holpen after verdict.

Verdict helps  
 diſcontinuance.

Rives againſt Moxham.

Cafe.

Tr. 15 Jac. Rot. 559.

Rives brought an Action upon the caſe againſt Moxham, that where the plain-  
 tiff lent unto the Defendant a ſpore to plough his ground, by two dayes:  
 the Defendant at Chipnam promiſed, that he would deliver her ſafe at the end  
 of the ſaid two dayes; and he did, during thoſe two dayes, exceſſively labour her  
 that ſhe dyed thereof: the Defendant ſayes that ſhe dyed of diſeaſes, abſque hoc,  
 that he did ſo exceſſively labour her that ſhe dyed thereof. And it was found for  
 the Plaintiff; and judgement was ſtated upon the motion of Francis More;  
 becauſe there was no place aſſigned in the Declaration where the labouring  
 was, which is put in iſſue; and therefore ought to be tryed where it was: but

Action ſhall be  
 laid, where the  
 cauſe of Action  
 appeareth to  
 riſe.

if the promise had been laid in one place; and the labouring in another, the Plaintiff might have taken his choice, to have brought his Action in either: but then the venue and trial should have been according to the event of the issue non assumptus; or non laboravit. But note that after in Hil. Terme 15. Jac. judgement was given for the Plaintiff; for the issue was taken from the place of the Action, which shall be taken right where the contrary appears not; otherwise, if the labouring had been laid in another place.

Covenant.

Collins against Throughgood.

Judgement against an executor in Covenant broken by himselfe shall be de bonis Testatoris.

Collins against Throughgood. Executor; an Action of Covenant was brought against the Executor; and the breach was assigned for default of reparation committed in the time of the Executor; and damages were assessed. And it was moved by Towse, whether the judgement should be de bonis Testatoris or propriis. And upon view of precedents it was judged de bonis Testatoris: for note that it is the Testator's Covenant, which binds the Executor as representing him, and therefore he must be sued by that name.

Deceit.

Tr. 15 Jacobi. Rot. 924.

Ancient demeſne ſue tryed by the Book of Doomſday.

Action of Deceit brought by A. B. for leaping of a fine of Lands in ancient Demeſne; and the issue was, whether the Manor of Little Bowden in Northampton were ancient Demeſne, or not. Whereupon Doomsday Book was brought into the Court; and there shewed; whereby it appears that the Manor of Bowden, in County of Northampton, was ancient Demeſne, but no fact in County Northampton, and so the Plaintiff was barred.

Prohibition.

Prohibition.

Hibborne moved for a Prohibition, and the case was; One sued for a Legacie in the Court of Arches, and the Archbishops pleaded a release, and proved it by two witnesses. The Plaintiff denied not the Release, but replied that the Indenture that made it was an Indenture, and the Prohibition was denied; for it was pertinent to the cause, and the Plaintiff's motion. But if they will disallow the proofs because it is but by one witness, which he made a cause at the first, a Prohibition will lie; for it is not sufferable by our Law to disallow that proofs against a Legacie which is allowable by law against a Statute recognizance, or judgement; for that would make a Debatable. But if they will except to the credit of witnesses as the like, they may according to their Law.

In a Legacie the Court of Audience, refuse single witnesses.

Court shall have tryall of Ideacy upon ſuite of legacy.

Harris against Cotton.

An Action of Debt upon the Statute of 12. Ed. 1. for not setting out of Witches, Towse moved the Court that the case was thus, that the Corn was growing upon the Glebe land of the Vicar, which was discharged of Witches being in his own use; but if it were let out, did pay Witches. Now the Vicar here did sow the Land himselfe being in his own hands, and dyed before it was severed, and his Executors did cut and carry the Corn away, and he that had the Parsonage appropriate brought his Action, whereupon he prayed the opinion of the Court whether he might plead nihil debet. But the Court would give no opinion, because it hanged before them in suit.

ed illi non A  
eds, li. 1. 1  
non A. 1. 1  
non A. 1. 1

John



John Harbin & Vxor versus Greene.

Case.

Tr. 14 Jacobi. Rot. 2163.

Harbin and his wife brought an action upon the case, against Maurice Greene, reciting that the Bishop of Sarum was seised in fee in right of his Bishoprick of Sarum of and in foure mills in the City, and that there is a custome there, that all the inhabitants resident within the City in any ancient house holden of the Bishop, &c. a tempore &c. all their graine whatsoever by such inhabitants in their said messuages spent or sold, at the said mills and not elsewhere, without licence, &c. have used to grinde and pay for the grinding, and in consideration thereof the said Bishops, &c. a tempore &c. have used to keepe servants, &c. to grinde, and loaders to carry, &c. and so convey the spils to them by demurrage Anno 11 Jac. And that the defendant dwelling in an ancient house, &c. Anno 12 Jac. & diversis diebus & vicibus inter eundem diem & quartum diem Aprilis, Anno 2 Jac. Diversa grana tam sua grana in Mesuagio pendebat quam venditioni exposita ad alia molend. & non ad prae. molend. &c. molavit ad dampnum, &c. And upon issue not guilty, &c. it was found for the plaintiffe, and judgement was notwithstanding given against the plaintiffe, and nihil capiat, for two causes: first, that the custome it self was unreasonable, for the reason and use of such a custome is, that the coyne that man doth grinde, he should grinde there, and not elsewhere, and therefore both he is bound by the custome, the one to bring his coyne to grinde there and not elsewhere; the other to maintaine his spils and all provisions for grinding, and in such actions will lye on both sides if there be a default. And it was holden that this custome would aswell hold for coyne brought, as for coyne growing within the Towne, so if were spent within their houses, being grownde both for consideration aforesaid. And the rather, because the houses are holden of the Bishop, though in a secta Molendini by tenure it would not be so. But the fault was, that by this custome if a man buy coyne, he cannot sell it againe in coyne in his house, for he must first grinde it at these spils. And he hath assigned the breach as well in coyne sold as spent. And I am of opinion, that if he had assigned it only in coynes spent, yet it would not have served, because the custome it self being intire, is totally void, though some part of it alone might be good in Law.

Custome of  
suit to a Mill  
unreasonable.

Another fault was, that he assigned the breach Anno 12 & diversis vicibus betweene that, and Anno 2, which was long before the plaintiffes had interest, and the damages were given intire, upon the not guilty to the whole, which damages will be understood to be given not according to the Law, but according to the allegation of the plaintiffe who layeth his damage for all and the verdict of laymen who finde him guilty de premissis to the damage of, &c. and makes no difference that the speciall breach is right, An. 12. and the rest cometh by diversis diebus, like a trespassse with a continuando for which damage is also given, a fine.

Note there was no mention that the action was brought by the husband and wife both; being onely to recover damage, and not for the Verme.

Gogles Case.

Trespasse.

Tr. 15 Jacobi. Rot. 3209.

Gogle brought an action of trespasse, Quare clausum fregit, &c. at Bar. Norf. in Uppingham. The Defendant pleaded that he was seised of an house &c. in Coleby in the same County, and prescribeth to have way from the said messuage over the ground in question to a common way leading to the City of Norwich, and since taken upon the prescription, and the Venue was taken from Banningham and Coleby, and found for the plaintiffe, and judgement was moved to be stayed upon the motion of Richardson, because there was no place assigned where that way (leading to Norwich) lay, which is now made part of the prescription and since; and therefore must have his venue and triall, though the material part of the way was only whether it lead over this ground or no, where he might have

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ad mmo  
of pntes

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Judgement.

have left, and then the triall if it had been against that prescription had been well. But in H. l. Terms the plaintiffe had judgement, for though a way must be pleaded à quo termino ad quem, because you must not goe over my grounds but to the right place, yet because here the visne is from all the places named in the record, the triall shall not be avoided by a meere imagination that the highway lay in another towne, for it may lye in the same, and no triall hath been taken, but where the other visne hath appeared in the record.

Leets and Edwards.

Tr. 15 Jacobi.

Whether the  
Common be  
extinct, &c.

**B**etweene Leets and Edwards, the case was, that a Coppyholder of Inber. tance which hath common appendant in another manor, purchaseth the freehold and inheritance of the coppyhold, whether the Common be thereby extinct.

Debt.

Dorrel versus Andrewes.

Mich. 14 Jac. Rot. 2327.

Entry & ex-  
pulsion, &c.

**A**ction of Debt was brought by spiritis Dorrell against Andrewes a Knight, upon a lease made by her to him in trust for Trussell for 75 pounds a Quarters rent, and declared of a demise de toto illo Messuagio capitali maner. & domo mansionali cognit. per nomen de Causton infra parochiam de Dunchurch ac omnia horrea ter. tenements, &c. situat. in Causton. The defendant pleads an entry and expulsion out of the Garden house, and well though, parcel of the tenements, &c. whereupon issue, and the Verdict was de Causton infra parochiam de Dunchurch, and the plaintiffe had judgement notwithstanding exception taken to the Verdict.

Judgement.

Goffe versus Browne.

Tr. 5 Jac. Rot. 1618.

Obligation.

Arbitrement  
seeming larger  
then the sub-  
mission.

**G**offe versus Browne upon an Obligation dated 23. Feb. Anno primo, to performe an award of all causes untill the day of the date of the bond. The defendant pleaded Nullum arbitrium. The plaintiffe replied that 28 Mar. An. 2, they made an award de & super premissis, that Browne should pay the plaintiffe 20 pound at Mid. following in full satisfaction of all matters between them, and that they then should make the one to the other general releases of all matters between them, and assigned the breach for non-payment of the 20 pound. The defendant demurred in law, because the award did seeme to exceed the submission being for discharge and satisfaction of all matters to the day of the award, which was more then was submitted, for it may be that the arbitrators might mean some part of the 20 pound, in discharge of those causes that might arise between the 23 of February and the 28 day of March, which were not within their power, and so for the release: yet judgement was given for the plaintiffe, which must be either because de & super premissis may import a restraint to the things submitted, or else that no new causes shall be supposed except they were alleged, (as in pleading of awards of causes they doe not averre that these were all) or else that the award of all causes may be reasonably understood all causes submitted, being joyned to de premissis, and that therefore release so made, should have been a good performance of the award. See Tr. 43. Eliz. Rot. 946. A case much alike; Debt by Barnes against Greenly upon an Obligation dated 4 Sept. to performe the award of all causes till the day of the date, the plaintiffe pleads the award de premissis, viz. of all causes till the third day of September, and assigns a breach, the defendant maintains the barre ut prius quod nullum fecit arbitrium, and verdict for the plaintiffe and judgement. And here the award was a day short of the submission, and upon this a writ of error was brought, and the record removed, but what issue it took I know not.

Judgement.

Award.  
Arbitrement  
seeming larger,  
or not so large  
as submission.

Judgement.

These two Records were shewed upon an Action of Debt brought by Lea, against Paine, 14 Jac. Rot. 953. upon a Bond dated January 13 Jacobi; for performance of an award of all causes between them. The Defendant pleaded, an award made, the plaintiff replied that in April 14, there was an award made between them, secundum formam conditionis, de & super premissis, scilicet that the Defendant should pay unto the plaintiffe 20 pound in full satisfaction of all Controversies, untill the day of the award; and that the Defendant paid it not, whereupon the Defendant demurred. Upon these cases the Court inclined strongly to Lea, the plaintiffe. And in Hill. 15 Jac. gave judgement so him. And yet if the defendant had paid the 20 pound and the plaintiffe accepted it according to the award, it would have satisfied and discharged any Trespass or the like done by the defendant to the plaintiffe between the date of the Bond, and the award, for it might be averred a satisfaction for it. And so in these cases of an award it might have been averred that some new cause of action had been grown since the Bond and made known, and then the Court must have taken knowledge; but the award in that point had not been warranted by the submission.

**Trespasse.**

Tr. 15 Jac. Rot. 3049.

**A**ction of Trespass, Quare vi & armis bona & caralla, viz. Palos, Ralos, &c. and after verdict it was moved that Ralos, was no Latine word, and no judgement given for the plaintiffe.

**Gibs versus Jenkins.**

Tr. 15 Jac. Rot. 1634.

**G**ibs brought an action upon the case against Even Jenkins for speaking of Welsh words in the presence of others understanding the language, and did it down the words in Welsh. Upon issue not guilty after verdict witnesses were sworn for the signification of the words, and some affirmed that the words were commonly taken, and so understood for swelling, which others denied; but both agreed that the true and proper signification of the words was bearing away, whereupon judgement was given against the plaintiffe.

Action for Welsh words.

Judgement.

**Tooker versus Loane.**

**Prohibition.**

**G**iles Tooker's Reader of Lincoln-Inne and Charles his Brother, administrators of Maude Tooker their mother, by Serjeant Harris, moved for a prohibition against Loane, and the case was, that Maude had issue the plaintiffes, and John and Thomas, and Thomas had issue nine children, and John three, and were dead, the children being infants. The administrators upon their accounts being by John Bennet by his mediation, and not judicially, were content to make a distribution of the estate of the testator per capita not per stirpes &c. &c. converso, Loane being Curator ad lites for the infants, appeared to the Delegates, and a prohibition was granted because the Ordinary hath no power to make distribution of the surplusage, nor to take bond for it by the true meaning specially of the Stat. 21 H. 8. which intends a benefit to the administrators, and not an unprofitable burthen, and therefore gives a preferment to the wife and next of kin, &c.

Stat. 21 H. 8. the Ordinary cannot make distribution of the surplusage.

Charles



Scarlet against Stiles.  
Tr. 14 Jac. Rot. 541.

Case.

Suff.

**S**carlet brought an action of the case against Stiles, for these words, Thou dost steal a sack: The defendant pleaded, that there was a sack of a mans unknowne name, and that the common name was, that the plaintiffe had stole it, whereupon the defendant did informe Thomas Kempe a Justice of Peace &c. that he had stole it; and in complaining and informing the said Justice thereof he did there in the presence of Kempe and of the plaintiffe say unto the plaintiffe and of him, Thou dost steal &c. quæ est eadem, &c. whereupon the plaintiffe demurred in law.

## Berries Case.

**B**erry sued for tythes of hay in specie, and in a prohibition issue was taken, whether the inhabitants had used to pay for all tythes of hay of all ancient meadowes within the Lotone, a certaine rate tythe. The Jury find there was such a custome for all the ancient meadowes, saving for certaine called Barton meadowes, for which tythes had been paid in kinde, and that the party (sued in the Spirituall Court) had hay upon five acres of the Barton meadow. Now the question was how Berry the Parson should have his consultation: for if the Jury had found against the custome generally (as they might well have done) he should have had his consultation for all: but now that the Jury hath found the truth distributively, that the plaintiffe had cause to sue in the Spirituall court for one part, but not for the other, we shall never give them a consultation, so proceed in all, no nor in part, where the suite appears to us originally ill founded, and a prohibition leaves more power in this Court then other actions, in as much as it locks up that Court which cannot require to be opened but with the key of right & justice, as in the case of Pell and Sanderson, M. 1. & 2. Fitz. Dyer. 170. 171. A man sues for tythes in kinde, the defendant sues a prohibition upon a curse of messuagium land, paying no tythes, whereupon issue, and it was found that it was barren, but yet paid a small tythe. So it was found against the plaintiffe; and yet consultation was denied, because he should not have sued for tythes in kinde, which if they should grant a consultation should be allowed but for that small tythe. But in this case Berry must have consultation for the Barton lands only, for the libell for tythes in kinde for the 100 acres is severall for all or any part, and therefore here for so much as was Barton and out of the custome it was well libelled, as if it had been for that alone.

## Thompson versus Comfort.

Norff.

3. H. 11. the  
vicar of  
St. Mary's  
was not bound  
to pay tythes  
of honey.

**N**ear Thompson and Comfort Clerks, the case was, that Comfort sued for tythes of honey and divers other things, the plaintiffe obtained a prohibition for all the tythes libelled saving the honey. The Parson had sentence for all the tythes before the prohibition delivered, and after the prohibition delivered, the Judge proceeded to the execution of the sentence for the honey and to taxation of costs. If the costs were taxed before the prohibition delivered (which must be then understood as large as the sentence which is for all) then must they not proceed to the taxing of all the costs; but if they did tax the costs after for the suite of the honey only, though they set as much as they meant to give for all, they are out of the danger of the prohibition, for where the cause belongs to them, the proportion of costs is of their jurisdiction, and not of ours. Now if after the prohibition which was with an exception be taxed costs, pro expensis litis generally, without the quoad &c. Yet I think it well enough, especially when his intent appears to proceed upon the principall, only for the honey excepted.

Bischof

**Biccot and Ward.**

Cafe.

Ineer Biccot and Ward, the cafe was, that one having an ancient Watercourse to a River coming to his Mill and the ancient bankes of the river being become false and hollow, by direction of certaine justices, a damme was made a Road from the river bank in another mans ground, and so the river was holten in. Now another, not owner of the ground cut up that damme whereupon an action of the cafe was brought and laid for cutting and subverting ripam eujusdam rivi: which coming to trial before me, after Evidence I caused it to be stayed lest it should passe against the plaintife. And now the Court held the declaration insufficient, and I gave direction, that he should take a new writ according to his Cafe de quadam ripa Anglice a damme includente Rivum predictum. It was before laid to be the banke, time out of mind,

Northton.  
Ripa Rivi.

**Winchcomb and Pulestom.**

Q. Imped.

In the Cafe of Quare Imped. betweene Winchcomb and Pulestom. supra. After it was resolved upon publique Argument that judgement should be given for the King. It was prayed that a writ might be awarded to the Bishop in the King, against which it was objected, that it was repugnant to the Record, in that Pulestom the defendant pleaded himselfe Parson impersones, and againe in the end of his Plea saies expressly, that the King presented him, so that he was admitted, instituted, and inducted at the Kings presentation before the writ brought, so by the Record it appears, that the King hath the right of that, for which the writ is required, yet because it was affirmed by the Council of Pulestom himselfe, that the Church was not full, but that his Plea in that part was untrue, the Court entred into consideration, what was fittest to be done in this Cafe and the like.

Vide supra.  
A writ to the  
Bishop where  
the Church  
seemes full.

First, it was observed that if there were not an helpe, there would follow inevitable mischiefes to the King and his Presentee. If a Quare Imped. were brought against him before Induction, for whereas if the Quare Imped. were brought against the Clerke, or the Incumbent of a Common person, he may abate the writ, because you name not his Patron with him, who may defend his title, though he be not inducted, so as he may plead himselfe; This is not so in the Cafe of the King, for he cannot be made a defendant, but the action must be brought against the Clerke alone, who cannot plead except he be inducted, and the Action must goe against him, or else if he plead himselfe inducted to inable himselfe to his defence, the same being untrue, though he win the Cause, yet neither he nor the King, shall have benefit of the suit, by writ to the Bishop. Therefore it was considered, that though it was confessed of Record by Pulestom, that the Church was full of the Kings Presentation, that this was not binding to the King, that was no party to the confession. Now therefore saye the case to be that a quare Imped. were brought against a Common Patron and his Clerke and the Patron sets forth his title to the advowson, and confesseth no plenarty of his Presentation, & the Clarke on the other side would plead as here Pulestom doth, that he was inducted &c. which were false, yet no doubt the Patron should have a writ to the Bishop, for the false plea of another shall not conclude him; the rather because the Patron could not properly contradict his Co-defendants plea in that point, much lesse shall the defendants plea here conclude the King; that is no party at all to this suit in point of prejudice, and yet by a speciall prerogative, the King is to take Benefit of his title found as effectually, as if he were party.

Now it was observed that as this were mischievous to the King to be denied, if the Church were void, so on the contrary, if it bee full (as it was pleaded) it can be no mischief to Pulestom, for either the King will not take the writ, or (if hee doe take it,) the Bishop may returne the Cause of non execution

execution, or if he should admit another Clerke, it would be utterly void.

And it was further observed, that the Awarding of a writ to the Bishop was an incident, and part of the soyme of judgement in a Quare Impedit, scilicet damages for the disturbance, and the writ to the Bishop for gaining the presentation. And therefore that soyme of judgement, may be where the Court sees there can be no fruit of it, as F. B. 39 D. A. byings a Qu. Imped. against B. and B. byings an Alike of barrain presentation against A. both for one presentation, B. hath judgement in his suite, A. is non suir, B. shall have two judgements, both of writs to the Bishop, and writs for damages. But the Court sees he can have but one effectual, so 11 R. 2. Quare Impedit 144. In Quare Impedit, the defendant pleaded that the plaintiffe had filled the Church hanging the writ, whereupon the plaintiffe demurred, which confessed as much, and yet judgement was given of a writ to the Bishop, and F. N. B. br. 35. C. agrees that a presentation hanging the writ, shall not abate the writ, and 7 H. 4. 34. & 36. A Quare Impedit was brought against two whereof one pleaded an insufficient plea, whereupon judgement is for a writ to the Bishop, and the other pleaded, that the Church was full of the presentation of the plaintiffe, the day of the writ purchased, and Hall there saies, that if it be found so, yet the plaintiffe shall have his judgement of writ to the Bishop. But 12 H. 4. 11. & 13 H. 4. 7. If a Patron have his Clerk in, he cannot afterward bring his Quare Impedit, for his writ is false and abatable, for it is quod permittat presentare ad Ecclesiam quam vacat, & 14 Ed. 3. Fitz. Quare Impedit. 52. The King brought a Quare Impedit, against a Prior, alien, and made a title to the King by Act of Parliament. The Prior pleaded that the Church was full before the Kings title, whereupon Shere awarded a writ to the Bishop, for the Prior, though he had pleaded the Church full. But indeed he did not plead, whether it was of his others presentation or others, and it was so in the Record it selfe, for I caused it to be searched, to be the end Warburton, Winch, and I agreed, that a writ should bee Awarded to the Bishop, for the King, either ex officio Curie, as being a part of the Kings judgement, and no way mischievous, or else (as Warburton desired) upon a surmise of the King. So in the end the judgement was dyatone up and parolle by me and entered in hac verba, thus.

Octabis Michi. Ad quem diem hic venit pred. Ric. Pulleston per Attornatum suum pred. & super hoc visis omnibus & singulis premissis pred. & per Justiciarios hic plene intellectis eisdem Justiciariis hic evidenter constat & apparet per veredictum pred. in forma pred. redditum quod ius presentandi idoneam personam ad ecclesiam predictam ratione Simoniaci agementi pred. inter pred. Willielmum Walker & pred. Wm. Say fact. ac per Jurat. pred. superius compert. vigore stat. pred. inde edit. & provisi ad dictum Dominum Regem nunc spectat, & per tinen super quo pred. Ric. Pulleston per Cur. hic allocut. si quid pro se habeat vel dicere sciat quare bre. dicti Domini Regis pro eodem Domino Rege de & super premissis pred. Epo. adjudicare & demandari non debeat, dicit quod ipse non dedit, sed bene cognoscit & fatetur quod bre. illud productum dom. Rege Epo. in forma predicta adjudicari & demandari debet, quod quicquid sit impetrationis brevis originalis pred. seu unquam postea in rei veritate non sit, persona Ecclesie, pred. impersonata in eadem ex presentatione dicti dom. Regis nunc (non obstante placito pred. per ipsum superius in contrarium inde placito) Ideo concessit quod dict. dom. Rex nunc habeat bre. Epo. Winton, quod non obstante reclamatione pred. Benedicte & Rici. idoneam personam ad ecclesiam pred. ad presentationem dicti Dom. Regis nunc admittat &c. concess. est etiam quod predictus Benedictus nihil capiat per bre. suum pred. sed sit in omnia pro falso clamore suo, & predict. Richardus eat inde sine die.

Bre. Episcop.  
where the  
Church see-  
meth full by  
Record.



Tuſton verſus Nevill.

Star Chamber.

Mr Humphrey Tuſton exhibited a Bill into the Star Chamber, againſt Maſter Chriſtopher Nevill, ſonne to the Lord Aburgavenny, for a Riot; and ſaid by way of Inducement, that Nevill had ſolicited his wiſe to inſiſt both before and ſince his marriage with her, and that this being made known unto him by his wiſe, he cauſed her to write letters to the defendant, giving him hope of her inclination, and appointing him a time by night and place, at which the defendant coming (and the plaintiffe with a man diſguiſſed like a woman being there ſpeaking as much) the defendant and others in his company made a Riot upon him, and his company.

Solicitation of Chaffry, is not examinable in the Star Chamber.

As to this the defendant, as to the Riot answered: But as to the ſolicitation of the Ladies Chaffry demurred; whereupon motion being made in Court, though there were ſome of another minde, yet it was reſolved and ruled that the defendants Demurrer was good; and though it was urged, that this Inducement ſerved very much both to aggravate the defendants Riot and to juſtifie the plaintiffes traine, yet the point of it ſelfe was naturally alieni fori for the ſmall Court whoſe proceeding in this caſe was not to be ſuſpended nor prevented. Beſides, the fault of ſolicitation is of ſo uncertaine acceptation, as is not to be here examined.

And laſtly to examine ſuch a fault by the oath of the delinquent, is not allowable as being a delict that we cannot cenſure, and it may prove ſcandalous in the Court, if the defendant ſhould upon his Oath (which were in him examinable, if the Court ſhould conſtraine his answer) criminate the Lady, were it true or no, for that could never be ſatisfied, being a point ſo ſecret as ſolicitation.

But this Bill were allowed though it were a meer croſſe Bill to the like he exhibited by Nevill againſt Tuſton for the ſame Riot.

Worceſter.

In a ſuit in the Star Chamber by the Kings Attorney againſt Worceſter, it was agreed that a proceſs ad audiendum Iudicium in that Court, is not holden ſufficiently by leaving it at the houſe, though the wiſe and ſervants know it, but muſt either be delivered to his perſon, or elſe he being at home, or otherwiſe proved by Affidavit to have knowledge of it. But if a proceſs be left at the houſe one Terme for a hearing, to be one Terme after, ſo there be a convenient ſpace of time, it is ſaid by the Court, to be ſufficient upon reaſon of preſumption of notice, and for the miſchiefe in the contrary; and ſo in this caſe, where proceſs was Awarded.

Star Chamber. A proceſs ad audiendum Iudicium in Star Chamber how ſerved.

Hall verſus Winckſeild.

Debt

Hall brought an action of debt 100. pound againſt Winckſeild, and declared upon a Recognizance taken before me in Serjeants Inne, in Fleetſtreet London, out of Terme and layd his action in London, whereupon the defendant demurred, and the queſtion was, whether the Action ought to be brought in Mid. where the Recognizance is recorded or in London, becauſe the Entry of the Record is, that the Recognizance was acknowledged before me, at Serjeants Inne in Fleetſtreet London ſuch a day, which was out of Terme.

Debt or ſcire fac. the place where that ſhall be brought upon a Recognizance taken in London, by a Judge of the Common Pleas.

Whereupon it was agreed, firſt, that the ſeverall Judges may take Recognizance out of Terme in any part of England, as it was reſolved quarto Mar. upon writs of Proceſſants, Brooke Recognizance 20.

Next, it was agreed, that though it were not a perfect Record, till it were entered upon the Roll, yet when it was entered it is a Recognizance from the

first acknowledgement, and binds persons and lands, as a Record from that time, For it is the acknowledgement before the Judge that gives it force of a Record, though the Enrollment be necessary for the testification, and perpetuating of it. Against the Bookes are, and I agree that if a man recover any thing, or debt in the Common pleas upon Trespass, or Obligation laid in any other County, if the plaintiffe will bring an Action of debt for the same recovered, he must lay it in the County of Mid. and not in the County, where the first Action arose: and the reason is apparent, for he must count upon the Record, by which it appears to the Court that the Cause of this action ariseth in Mid. where the judgement was given, & the Record is for that reason that was done, and that Obligation that was made in another County, is not now the Cause of this Action, but the judgement, which hath made novationem contrahendi, which begins there, and regularly it is true, that every Action must be brought in that County, where by the Record it appears the Cause of Action began, which sometimes may admit an Election, as where the admirall Court sits in Mid. and summons a party in Essex, the Action upon the statute may be in either of both Counties. And if a man recover a debt in the Court of Norwich, and will bring his Action of debt upon that Record in the Common pleas, he must lay his Action in Norwich. But now observe this case, the Enrollment of the Record, both expresse that the Recognizance was taken before me at the place and time aforesaid by which (as is said) it was a Record ipso facto then and there, and the enrollment of it is but a Complement, and consummation of the same Acknowledgement and Record, and makes no change, as in the other case: But because both concur to the making of it a perfect Record, it may be that the Action may be brought in either County.

But I am of cleare opinion, that it may be in London as the first and more worthy part of the Ait, and therefore see 5 Mar. Brooke lein 85. where it is resolved by all the Prothonotaries, that a scire fac. upon such a Recognizance, shall be directed to the Sheriffe of London, and not of Mid. And Gager cited a President that upon a judgement given in the Common Pleas at Hertford Terme, and the Records brought thither, after, yet the scire fac. went to the Sheriffe of Hertford, and not to the Sheriffe of Middlesex, whereof the reason must bee, because in the Record it selfe it appeared, that the judgement was given at Hertford, and the like reason is in this case. But if the Entries of the Record were generall, that the Recognizances were taken before mee, it should be understood in Court, and then the Action were to be brought in Mid. See 18 E. 4. 18, 24 E. 3. 73. 22. 12 H. 6. 38. B. lein. 29. 30. 60. & Br. Breife. 191.

### Blounts Case of Common Recovery.

Common Recovery  
against  
the infant,

**M**emorand. that it pleased his majestie by his letters, under his privie signet and signe manuell bearing date 26 Novem. in the 15. yeare of his highnesse raigne, to signifie unto me, and my fellow Justices of the Court of Common pleas, that he had been humbly petitioned by Mountjoy Blount being under the age of 21. yeares, as well by himselfe as his friends and kinsmen, who were entred into whole custodie the late deceased Earle of Devonshire, did commit his estate in trust, that he would declare unto us his liking, that he might be admitted to have a Common recovery of the manner of Warrick for the payment of debts, and further advancement of his own meanes, to the use of the Earle of Buckingham, which his majestie by his said letter, did accordingly. And though he did never hold such recovery, very unlawfull nor hold in law, yet we have refused many motions of that kind, as holding it very inconvenient, but conveniency is discerned by circumstances. And therefore I acquainted my brethren, and determined, that I would send for the young Gent. himselfe and examine him tole and secret, of the reasons of this recovery, and of his own free will; which I did, and he being 18. yeares of age or thereabouts; (attested me of his own good liking, and that he did conceive it to be necessary for his estate,

state, yet not herewith contented, I caused the Clerk of Southampton, the Lord Daves, and Master Wakeman, the persons to whom the inquisition be and estate were committed in trust, and that they had faithfully performed it. And calling them into the open Court, and questioning with them, they confessed to me all that it was necessary for the young Gentlemen, and for his good of their knowledge to part with this thing, and that therefore they had made means in his Majesty for this letter in that behalf, whereupon the Recovery was made openly at the bar the last day of this Mich. Terme against Master Mount in person, and the Clerk of Southampton, the Lord Daves, and Master Wakeman were admitted his Guardians.

Brownloe and Waller: Prothonotaries gave me a note of the like recoveries against infants. M. 23 H. 8 Rot. 442 P. 38 H. 8 rot. 128 T. 26 Eliz. Rot. 17 M. 26. & 27 Eliz. rot. 45. & 72 P. 42 Eliz. rot. 1. & 63. 44. 45. 69. 70. 89. 91. 94. P. 32 Eliz. rot. 60 T. 38 Eliz. rot. 42 H. 40. Eliz. rot. 62 M. 41. & 42 Eliz. rot. 13 M. 34. & 35 Eliz. rot. 166 pro Zouch M. 39 & 40 Eliz. rot. 82. & 173 M. 41 & 42. Eliz. rot. 29. & 156. & 72. T. 41. Eliz. rot. 2 M. 44 & 45. Eliz. rot. 173 T. 40 Eliz. rot. 21 P. 41 Eliz. rot. 11 & 12 & 134 and others

Brickhead versus Archbishop of York.

Mich. 15. Jac.

Robert Brickhead brought a Quare Impedit against Toby Archbishop of York, and Alexander Cooke Clerk in the Vicarage of Lees. And says that divers persons were seized of the Vicarage of the Vicarage in fact and presented Robert Cooke; and then taking down the Admonition to the plaintiffs, and then sheweth that by the death of Robert Cooke the Vicarage was void, and it appertained to him to present and the defendants disturbs him to the damage of 400. pound; the Archbishop pleads, that the Vicarage is within his Diocese of York and that he claims nothing in the Vicarage or Admonition thereof, but admission &c. as Vicarage thereof, but further he says Good bene &c. verum est and confesseth all the titles as the plaintiffs have laid it, and that the Church voided by the death of Robert Cooke, and that it belonged to the plaintiffs to present as he supposeth. But he saith further, that the said Robert Cooke died 1 Jan. An. 12. Jac. ac pro eo quod eadem vicaria Ecclesiastica, vacavit per tempus semestre post mortem pred. Roberti Cooke nulla persona ad eandem Vicariam per prefatum Rob. Brickhead infra tempus illud presentari. Idem Archiepus. ad idem &c. Ordinationem &c. post tempus semestre illud diffusi scilicet 23. Dec. An. 13. Jac. iure suo ordinario consulit pred. Vicariam prefato Alexandro Cooke & cum institui & induci fecit, prout ei bene licuit, & hoc &c. unde petit iudicium &c. absque speciali impedimento in persona sua in hac parte assignato actionem &c. habere. Icheat versus eum, And Alexander Cooke the other defendant pleads by confession of the plaintiffs title, and the Collation &c. by laps altogether, as the Archbishop, unde petit iudicium &c. The plaintiff replies to the Archbishop, and confesseth that the Church voided 1 Jan. 12. Jac. by the death of Robert Cooke, and that the Church remaining void he did after the first of January and before the 23. Dec. An. 13. Jac. and within 6. months, that is to say 29. May. 16. 15. by his writing sealed with his seal dated the 27. of the same May present unto the said Archbishop &c. one Richard Middleton his Clerk praying him to appoint him to the said Vicarage, which he refused to doe, and afterwards, viz. the thirtieth day of the same May, did Collate it unto Alexander Cooke, & hoc &c. unde petit iudicium &c. In response for occasion predict impedimentum proed. Archiepus nec non huiusmodi Archiepus copulati ad iudicium, and makes the same replication to the plea of Alexander Cooke the Clerk, and they both demur liberally, upon the several replications, and shew so cause that they doe contains double matter and are material to the cause of Damages expressed, namely the double matter of the Plea, and divers Arguments on both sides, the Court was of opinion that the Plea was

Qu. Impedit.

For.  
Goldby.

Quare Impedit  
and no disturbance before  
the Action.

Action  
brought before  
Cause of Action  
on given.



was not double, the doublenesse or treblenesse was supposed in that the plaintiffe Assigned his presentation, and a refusal of his Clerke, and a Collation by the Bishop of his own Clerke. But it was holden by the Court, that the onely material part of the plaintiffes replication was, that he had presented a Clerke; for the substance of the defendants plea was, that the plaintiffe had not presented any Clerke unto him within the 6. moneths; and that he had afterwards collated.

Now to this the Replication saies, that he did present within the 6. moneths, so there is a perfect negative and affirmative which makes the issue; but yet the plaintiffe must adde a refusal to make good the disturbance laid, and then the plea is compleat, like unto the Case of an action of debt upon an obligation, to performe an Award, and the defendant pleads no Award made; the plaintiffe shewes the Award which makes the issue, yet he must add a breach, which though it be not issuable, yet it is so materiall a forme, that the plaintiffe hath no cause of Action without it. And therefore cannot have judgement without it: And therefore if it be omitted, and the defendant demur generally, I am of opinion clearly, that he may take benefit of it. And if in such omission the issue were taken Award or not, as it must be, and the Award found, yet the plaintiffe could have no judgement notwithstanding the Statute of Jeofailes.

Note the words of the Stat. of demurrers, the right (viz. of actions) must appeare to the Court not of substance to the action, otherwise in case of mere forme. Now the addition of collation in this case is but a matter of aggravation and surplusage; thus farre it went before it was discovered, that the presentation and refusal was laid 29 Maii. And the writt bearing teste 9. Maii; so as whether there was a generall disturbance laid in the declaration, yet the true disturbance whereby the plaintiffe intended to maintaine his action was done after the action was brought. Whereupon I was and am of cleere opinion that judgement must needs be given against the plaintiffe; for right and wrong are the mother of all actions; and therefore no action can be brought without laying a wrong done before the action, neither can there any full and perfect recovery be had regularly without convicting the defendant of a wrong; I say a full recovery, and regularly, because in some speciall cases, a man may obtaine the end of his suit in some sort without convicting the defendant of a wrong, but that must be in a speciall and regular forme; but never without a wrong supposed: as for example in this very case.

The plaintiffe layes downe his title to the abbouison, and the avoidance, and the disturbance. If in this case the Bishop say that he claimes nothing but as Ordinary, and demands judgement if without speciall disturbance, &c. Now the plaintiffe hath an election either to take his writt to the Bishop, or to retaine and prosecute his action on to a small judgement; if he pray his writt to the Bishop, he shall have it to the same Bishop for it doth not appeare to the Court, that he was a disturber; neither shall the Bishop be amerced, but the plaintiffe, pro falso clamore.

This forme is proper to this action and some few others (whereof I shall speake) and the forme and nature of this action doth well beare this proceeding; for the writt being quod permittat ipsum presentare &c. Et unde eum impedit &c. and the defendant comes in, and saith, in effect I suffer, and do not hinder you to present.

The cause is at an end if the plaintiffe will, and he may pray and take the effect of his suit which is presentation and no damage, because the defendant is not convicted of any wrong.

But now if the plaintiffe will not accept that reddition, but chooseth rather to make a full and small recovery, then doth he (as in all other cases of election) forsake and lose the benefit of the former, and stands to the hazard of the latter, to have either a full recovery, or a totall barre.

So that if he will lay a speciall disturbance, and it be tried against him, he is to be barred, like unto this if a man bring an action of debt upon an obligation

of 20 pound for the payment of 10 pound at a day past and the defendant tender at the day and uncore price offering it in Court, the plaintiff may accept it, and there is an end, but if he will proceed to a full recovery of the rent, and keep the tender, and that he found against him, all is lost. So in case if the tenant plead that the defendant detained evidence, the defendant answering in the evidence may have judgement maintenance. But if he will keep the defendant of the evidence, and that he found against her, she shall lose her tender.

So in the case of Dowry brought against a Guardian in Chivalry who pleads the detainer of the heirs his ward. So in the case of an action of debt brought against an executor, who pleads Rien enter Mains, and indeed hath them nothing, yet the plaintiff may have judgement for his debt presently to be had by sci. fac, when goods shall come to his hands.

Shipley's case, Co. lib. 8. 134. but if he will proceed to prove assets presently, and that he found against him, he shall be barred for ever, and yet there was a debt, and that in effect confessed.

So in a writ of spels, if the defendant plead not distrained in his default, the plaintiff may have judgement for his acquittal presently: but if he will proceed to prove that he was distrained in his default, and fail, he shall be barred. So in a warrantia Chariz, &c.

Now then closely to make a small recovery in a Quare Impedit, you must come into the Court or at the least make a sufficient allegation of a just cause of action, which is a disturbance by the defendants, or one of them before the action brought, whereas in this case it appears, that the disturbance whereupon you would maintain your action, was made after the writ brought; and that which makes it the worse against you is, that this appears of your own showing, that it is regularly true, that if the plaintiff will himself discover to the Court any thing whereby it may appear that he had no cause of action when he commenced it, his writ shall abate, as if he will demand a debt or distrain for rent before the day of payment of his own showing, it is against him.

Now more, if of his own showing though he had cause of action, yet it was in another manner, it will be against him. And therefore if some commit a trespass (which in its nature is joint and several) yet if the plaintiff will bring his action against one only, and declare that he with the other three did the trespass, his action shall abate; but if he had brought his action against one alone, and the defendant had pleaded that he with others did the trespass, and that the plaintiff hath released to the other and the plaintiff deny the release, whereby he hath in a manner confessed that the other were joint trespassers, yet his action shall not abate. But you say that the plaintiff hath laid a disturbance in his Court, which is supposed true, and done before the action brought. And that the defendant hath pleaded an insufficient barre to it for he hath neither denied nor confessed and avoided the disturbance laid, for, the relation after the writ is no answer. And therefore say you judgement ought to be given against the defendant, which is true if the plaintiff had rested upon the barre and demurred upon it.

But it is regularly true in Law, that if upon the whole record it appears that the plaintiff had no cause of action, and specially of his own showing, that the Court shall never give judgement for him, how else the defendant had misdeemed himself in his pleading, for melior est condicio possessoris, and the defendant is safe if the plaintiff misse him, for, vana est sine, viciis. Ridgways Case, Co. lib. 3. 52. and Burtons Case, Coke lib. 5. 39. A brings an Action of debt upon an Obligation against B, who pleads that it was upon condition that he should performe the sword of two, and that they then and nothing made no sword. This is naught. But if the plaintiff do allege an sword by the two or by the three, and allege not also a breach whereby it may appear to the Court that he had a cause of action, he shall never have judgement. And yet it was not the chief matter of his plea, no; inable, and the declaration was

was full and perfect, but that was but the beginning of a plea, and the Court must judge of the whole, whereof the declaration is but a kinde of summary. But when the defendant hath pleaded in barre, so that both parties are heard in part, then the replication and other pleading brings the whole case to maturity, and then the Court sees the truth of the whole case, and not before.

Collation by a  
Bishop by laps  
incurred hang-  
ing the suite.

Now to a question which hath been stirred and is of good use for learning, though it conclude not to the judgement of the case, I will speake a word.

Suppose the case to be that I have right to present to an abbouson, but I present not, nor am any way disturbed, but the Church remains void and open to me, but before the six moneths incurred or before collation made by the Ordinary I bring a Quare Imped. against him, whether now the Ordinary be debarr'd of presenting by laps, hanging the writ.

I am of opinion, that he is not debarr'd. And first if it were a case full of mischief that the Ordinary bearing himself never so justly and sincerely, should against law and reason be subject to chafeleffe actions and charges and defrauded of his due laps, and the Church kept void Ecclesia viduata by the fraud of the Patron by a fraudulent action as long as he list. For, if he brought no action, the laps should run, and now by bringing of a feined action he shall stop the laps in the Ordinary, and by consequence it will not come to the Ordinary nor to the King; but now examine the reason and the authorities.

Can there be any thing moze unreasonable then that a man should make benefit of an unjust suit as the plaintiffe should; or be punished doing nothing amisse, or against his office, as the defendant should.

But you will say to me, It is an effect of law, & executio juris non habet injuriam. For when the Bishop comes in, he is charged by the declaration with the disturbance, which if he doe not avoid, he shall be taken as a disturber, & then indeed he cannot collate, or his collator shall be removed. Wherefore, if when he doth appeare he doth but cast an Excuse, though that doe not make him a disturber to maintain the writ, because it is after the writ, yet it fasteneth upon him the charge of the disturbance laid in the declaration, so that he shall not be received after to plead ne disturba pas, or the ordinarys plea which amounts to as much; so that plea pretending innocency must (as all other the like pleas) be offered the first day upon the appearance, so delay makes him nocent, and so is oppositum in objecto. Then againe if the Ordinary plead his owne plea of acquittal amounting to Ne disturba pas, the plaintiffe may pay a writ to the Bishop, and so remove his Clerke, because he comes in hanging the writ, and thus it is a Dilemma made by law, and not by fraud of the party. And the rule in the Reg. 40. 31. is so. What if the Diocesan be named defendant in the Quare Imped. hee shall never present by laps.

\* Note that the writ to the Bishop in this case shall not be with the clause of non obstante reclamatione episcopi, for he makes no claim as in the case of disturbers.

Note that the Ordinaries plea neither makes the Patrons title better nor his owne worse then are proper to them both, and as they were before, neither disclaims his due.

To this I answer, that if the Bishop do not plead according to his innocency, that the proceeding shall be against him, and the consequence of it as against a disturber. But if he plead that he did not disturb, which is true, it shall be taken according to the case that he did not disturb before the action brought neither unlawfully, nor by lawfull collation; but it can never be understood to deny or renounce any actual collation since, so; if he should plead that; it were vain and to no purpose, (as it hath beene said.)

Now then if he did not disturb before the writ purchased, and therefore hath not disposed himselfe of his right of collation in his due time, and then collates by laps lawfully when his time comes when the Patron hath willfully and without his fault surceast his time, and then pleads that he claimes nothing, but as Ordinary &c. without mentioning his collation hanging the writ, because it is impertinent (as it hath beene said) neither indeed do I see how he can be received to plead it, no not by the way of saving it by protestation as upon attornment to save possession of waste. But certainly it is not necessary, though upon such plea the plaintiffe may have a writ to the Bishop, he may perhaps be compellable to admit the Clerke of the plaintiffe in obedience to the writ, but yet it shall not take a removeall of the Bishops Clerke, but he shall retain the Benefice as having



having the better right. Like unto the case and reason where A. brings a Quare Imped. against B. and hanging the suit, a stranger presents and his Clerke is instituted, &c. And then A. hath a judgement against B. and a writ to the Bishop non obstante reclamations B. the Bishop shall receive the Clerke of A. without disputing of the right of A. and C. but yet if C. have better right to the patronage his Clerke shall retain the Benefice, and so è converso.

\* But now I put another case. If my Church become void, and I present to the Bishop, and so also doth another that hath no right, in which case the Bishop though he may receive at his perill, yet doth (as he may lawfully do,) refuse to receive either till the right be inquired, without doing himselfe any act of disturbance, in this case if the true Patron do bring his Quare Imped. against the disturber only, then the Bishop may collate by laps without question. But in that case if the true Patron name the Ordinary, a defendant together with the disturber, and then the Bishop come in and plead that he claimes nothing but as Ordinary, &c. and the plaintiffe hath an award of a writ to the Bishop with a cesset executio, &c. and then recovers against the disturber, and the Bishop in the meane time collates by laps, in that case perhaps the Bishops Clerke may be removed, for it differs much from the former case; for here was a true and not a feigned disturbance, whereunto the Ordinary gave way so farre, that the plaintiffe could not get his Clerke received, but was driven to his Quare Imped. as if he had proceeded to his Jure patronatus without Quare Imped, and the time had incurred, the Bishop might have presented to laps remediesse; And therefore since he did his indeavour to present and was interrupted by a stranger, and the Ordinary also refused his Clerke, so that he had rather have an excuse then a justification, and now both being made defendants, and the plaintiffs title is approved against them both, as if it had been so from the beginning, it should be hard that the Bishop should make advantage of his refusal, which now appears to have been against right, and he party to the suit.

\* Note that it is not so much the presentation of the disturber as the Bishops refusal of the Patrons Clerke that presents which intitles him to the Quare Impedit. And therefore it is enough for a Bishop to escape the charge of a disturber and not also to make advantage of a laps caused by himselfe.

Lacyes Case.

Star Chamber

In the case of one Lacy a Bill was sentenced in the Star Chamber, and now the against whom the sentence passed exhibited a new bill of perjury against the witnesses, supposing that their testimonies were false and corrupt, whereupon the sentence passed, the defendant thereupon demurred in law, and this demurrer was referred to Mountague Chiefe Justice, who reported that the defendant ought to answer. Note this case and see it: And,

Anno quinto Jac. between Jarvous and North an Information charging the witnesses in a former suite sentenced to have been suborned and perjured was allowed; Note this is a legall and judicall proceeding which allows the sentence to be just according to the proofes, and impeaches the proofes, which (if it should not be allowed) perjury would receive warrant in a Court of Justice, and by the sentence of it whose office it is to punish it, but yet if the person sentenced will speak voluntarily to the same effect that the sentence was just, but it was grounded upon false testimony, the Court doth punish it commonly, for that is a cunning scandalizing of the sentence, and hath neither purpose nor protection of a legall proceeding. Yet this case is of dangerous consequence, for if it appears that the testimonies whereupon the first sentence was grounded, were false, a second sentence pronounce so, though this taint not the Judges, yet the sentence is in a sort falsified and ought not to grieve the party.

Sentence given grounded upon the witnesses, which are after sued there for perjury.

## Balden versus Temple.

Debt.

Escape out of  
Execution.

**B**alden brought an action of debt against Sir Thomas Temple late Sheriffe of Buckingham for an escape of one Cockman his prisoner in execution and upon issue nihil deber, the evidence before me at Guildhall London was this, that one Shortesbury Gaoler to Sir Thomas Temple, having the said prisoner in execution in his Gaole at Ailsbury, suffered him to walke abroade in the said Towne, yet for the most part with a keeper, whereupon I directed the Jury, and so they found against the defendant as an escape, for though the Sheriffe may remove his Gaols from one place to another within his, Bapltwick, yet he must keep it and his prisoners within it and not suffer them to goe at large out of the prison, though himselfe be attending on him, without an Habeas corpus from some Court of Justice. And let keepers of prisons beware when they receive an Habeas corpus from the Chancery or any other Court bearing teste in the end of a Terme to have the body of one in execution, in the Court the next Terme, that they doe not by colour of such writs suffer the party to go at large all the meane time (as it is sometimes practised) for, the writ warrants no more but that he be brought out of prison onely for that purpose, and onely for so much time as in judgement of law shall be convenient and necessary for the execution of the writ and no more, which in privilegiis odiosis must ever be strict.

## Sheriffe of Essex his Case.

Debt:

“**B**efore me at Guildhall upon an action of debt against the Sheriffe of Essex  
“Upon an escape it fell out thus upon evidence, that the prisoner having  
“been in execution, was willingly let go out of prison by the Gaoler, and then  
“came into the Gaole againe, and so remained in the Gaole till the time of  
“another Sheriffe and then escaped, whereupon this action was now brought.  
And I directed that this Sheriffe was not answerable to the action, for when the prisoner was let to go abroad voluntarily by the Gaoler, the execution was utterly discharged, so as he could not lawfully be taken againe nor judged in execution by law though the party would yeeld himselfe unto it, or the creditor so allow him. And therefore the next Sheriffe cannot be chargeable with him, nor answerable for him as in execution, neither can two Sheriffes be answerable simul & semel for two escapes out of one and the same execution at the same time.

**A**d at the same time another triall fell out thus. That upon a Capias ad satisfac. one was taken in execution by the Undersheriffe who tooke money of him for the execution, and let him go, and this he concealed from the plaintiff, and then the Sheriffe dyeth, a new Sheriffe being made, the same that was Undersheriffe before became Undersheriffe to him also, and procureth the plaintiff to take out a new Capias ad satisfac. against the party upon which he was arrested againe, and escaped.

## Mannering &amp; Vxor versus Dennis.

**S**ir Arthur Mannering and his wife, one of the daughters and coheires of Sir Thomas Dennis of Devonshire, exhibited a bill in Chancery against Gabriel Dennis, and the effect of the bill was this; that Sir Robert Dennis father of Sir Thomas in the 18 years of the Queen, had conveyed the substance of his whole inheritance to the said Sir Thomas for terme of his life, and so on, and for default of issue male of him and another brother of his, the land was limited to the father of Gabriel, and the heires males of his body, and added a proviso, giving him power to make a revocation by his writing under his hand

and ſeale in the preſence of two credible witneſſes &c. in ordinary forme, and alleged that he had made ſuch a revocation, and that the writing was extant, and therefore prayed proceſſe. The defendant deneged the revocation, and ſo that was the meere iſſue, whether there was a revocation or not, which Gabriel Dennis laboured by all meanes to bring to triall at the Common law; but was holden under injunction till by an accident he got a ſlip by the death of the party out of the injunction, and had a triall by Ejectione firma againſt Sir Henry Rawle that had married the other daughter and heiſſe, and had a verdict againſt him upon that very point and had judgement and execution of the ſpanow; yet the Lord Chancelor renewed his injunction for all the reſt, and preſſed to examination of witneſſes, and ſo the cauſe was heard divers dayes before him and me and Baron Altham, whom he called to his aſſiſtance, but he never came to conſult with us what to doe upon the hearing, but dyed. And then Sir Francis Bacon being made Lord Keeper, he called me to his aſſiſtance againe, Baron Altham being dead, and then queſtion was made by a former order of his, whether this cauſe were a cauſe examinable in Chancery. And it was reſolved by him, the Maſter of the Rols, and my ſelfe, that this cauſe was not fit for that Court, but for the Common Law except all cauſes that were triable naturally by the Common Law, and by Jury, ſhould be made examinable, and determinable in Chancery per teſtes, which were to confound jurisdictions, and to make the Common law and all the courſe of it needleſſe, and a handmaid to the Chancery, to take ſuch Cauſes, as it pleaſeth them to take, and ſo this cauſe after ſo long and tedious ſuit in Chancery was abſolutely diſmiſſt.

Cauſes improper for the Court of Chancery.

*Cavendish verſus Worſley.*

Chancery

Sir Charles Cavendiſh exhibited a Bill in Chancery againſt Worſley and Joped, and his two ſonnes, Sir William Cavendiſh, and another did iſſuethe exhibit a Bill of Reſtraint againſt him, and the Cauſe came to this, that the Grandfather of Worſley, being tenant for terme of life, the Remainder to the father in taile, the Grandfather levied a fine of the Land Threſcore yeares paſt to him, and the Father alſo conveyed the land by bargain and ſale, and ſo it came by meane conveyances to Sir Charles Cavendiſh, and in this cauſe alſo the Lord Keeper called me to his aſſiſtance, and we reſolved, that Cavendiſh could have no reliefe in this cauſe in this Court, becauſe by ſtatute tenant in taile is diſabled to barre or bind his iſſues, but by ſuch meanes as the lawes and ſtatutes have allowed.

cannot relieve againſt a ſtatute Law.

*Swaine verſus Holman & ux.*

Tr. 14 Jac. Rot. 755.

Richard Swaine Eſquire brought an action of Waſte againſt Thomas Holman, and Eliz. his wiſe of certaine ſpills in Scurmiſter, and declared of a leaſe thereof, made by Queene Elizabeth, unto the ſaid Elizabeth the defendant, when ſhe was ſole in the 8 yeares of her raigne, and that the King granted the reversion unto him, and then ſhe was the waſte. The defendants plead, that they being ſeiſed in the right of Elizabeth of the ſaid eſtate, they did in the 40 yeares of the Queene at Weſtmiſter ſurrender tam totum jus, ſtatum, titul. & intereſſe ipſius Eliz. quam lit. Patentes &c. & ſuperinde the Queene afterwards eodem an. 40 rectifying the demiſſe and the ſurrender (as aforeſaid) in conſideration of the ſame ſurrender did demiſſe the ſame ſpills unto the ſaid Elizabeth Holman, and two of her ſonnes, the plaintiffe maintained his declaration, and traivered abſque hoc that the defendants did ſurrender tam totum ſtatum, jus & intereſſe ipſius Eliz. prout, &c.

Dorſet. Brownelow. Conſideration in the kings Court of a former leaſe to a woman Coverd for her ſelfe ſurrendered.

Whereupon iſſue was taken and tryed before me in Middleſex, and the Jury found that the defendant being ſeiſed in the right of Elizabeth the wiſe, for Terme of her life by the firſt letters Patents, the Queene by the other ſaid letters



Judgement.

letters Patents did demise the said mentioned pills to the said Elizabeth, and to her said sonnes, Humfrey and Roger Holman, one after another for life, and then find the said second letters Patents, with recitall of the former estate of Elizabeth, and that she had surrendered totum jus &c. (as before, and in consideration of the said surrender did demise the same of new to her, and her said sonnes one after another pro et, and they find that the said second demise was made and had with the assent of the said Holman her husband, and that he payed the fine of 20 shillings, mentioned in the said letters Patents, and that both the defendants did agree, and claime by the later demise &c. &c. Whereupon after some argument, judgement was given for the plaintiffs, whereof the Serjeants principally made this reason, that the husband could not be said to surrender to the Queen but by record, whereas his assent was not of record, but was a thing dehors as it was found by the Jury. Justice Hutton, held that as it was put in issue, it must be understood of an actual surrender, whereas this was but a surrender in law as the most.

But that that answer [mes] principally was this, that the said demise import, and to the Queen in her recitall and consideration both expresse and concise, that the whole estate of Elizabeth, was surrendered, that is totally surrendered and vntied, so as it should be in her absolute power, to make a new demise perfect and permanent; whereas here if the second lease had been made to the husband and wife jointly, as it was not to her alone, yet upon his death, the wife might have claimed againe by her old term.

And therefore if the King would make the like recitall, and consideration of a surrender of totum statum, and the surrender indeed was upon condition revocable, the new estate would be void, as in deceit of the King, like the case upon the statute of 32 H. 8. of Leases, a surrender conditionall will not be with- for the law, to make good a new lease. And see Barwicks case, where a pretended wife who was surrendered to the Queen, and she in consideration of the surrender of the letters Patents, and of the estate that he held by them, made a new lease, and it was adjudged void, not because it was contrary to law, but because it was contrary in effect to the Queens meaning to take in such an estate as was in law.

But I am of opinion, that if the King make a new lease to his present lessee, in consideration of the same surrender of the former, that this will be clearly good, by the surrender in law. And if a man will deny the surrender, he may demur in law upon it, because it appears to the Court, that the acceptance of the new lease, is a surrender of the old. And if an estate be made to a man wife de novo, it is not necessary to averre his assent, for it vests still by assent, but in this case an assent is necessary, because the wife had an estate before, which cannot be divested, but by his assent to the later estate.

## Pie versus Lovell.

Mic. 15 Jacobi. Rot. 658.

Hil. Decimo  
quinto Jac.  
Information  
for Recusancy  
in the Com-  
mon Pleas.

C. 11. 61 a.  
Folters case.

**P**le the Informer had a verdict for the King and himselfe, against Sir Francis Lovell, by information in the Common Pleas for two hundred and twenty pounds for eleven months absence from Church. Now in arrest of judgement Achor moved that the information lay not in the common Pleas, but was by the expresse letters in the stat. 28 Eliz. restrained to the Kings Bench onely; with an expresse negative, and not elsewhere.

This exception tooke life from a conceipt of Sir Edward Cokes in Folters case lib. 11. where after some things resolved, hee saies that it was well observed, but doth not say by whom (but I take it by himselfe) that the stat. 28 Eliz. had restrained the informer, onely to the Kings Bench, and so he doth both exclude the Common pleas, and Exchequer. Whereupon the Court tooke time, and spake publiques in it, Hutton, Warburton and myselfe (Winch, being then sick) and we all agreed clearely, that the Information did well lye in the Common Pleas, and that the contrary opinion was an Error, springing out of the common

common mistaking of a law by cleaving too much to the word, and not observing the intent and meaning of the law. For first it is clear, that the statute 23 Eliz. gives the remedies upon Recusancy, one for the Queens alone by indictment (and that Coke confesseth in the same case) and that appears by the clause, that admits submission before judgement, or upon Arraignment before Justices of Oyer, and Terminer, or Assize, and Gaols delivery, and before Justices of peace; the other is by action of debt, plaint, Bill or information in any Court of Record for the Queens, the informer and the poor, so here it is clear, that the informer is enabled in these Courts by that stat. now the stat. of 23 Eliz. was made only for the benefit of the Queens in her proper suits by indictment, and that Coke himself in Fosters case so, confesseth was resolved, and therefore the word (Indictment) is found almost in every Clause of that stat. and that the statute was made only for the Queens, and for her indictments. Observe all the Clauses. First, fraudulent conveyances are made void, as against the Queens. Secondly, that all convictions shall be certified into the Exchequer, to make process for the Queens. Thirdly, then follows the clause, that every conviction hereafter shall be in the Kings Bench, or the Kings Bench delivery and not elsewhere. The meaning of which Clause is, That the Indictments for the Queens her self shall be there, and not before Justices of peace, as by 23 Eliz. it must be, which was the reason of the negative (not elsewhere) And note that this clause did not give unto the Queens any new mode of conviction by action of debt, or information for her self alone, for afterwards the stat. 35 Eliz. was made for that purpose. Then the fourth clause is, that every recusant before convicted generally, shall without any other indictment, which selves plainly, that all respect to Indictments, and convictions hereupon, and so 35 & 7 clauses, and lastly the sixth clause which gives the informer of conviction, by indictment and Proclamation. Neither is it possible, that the laws that were sharpened, and added from time to time should be taken, or diminish the means of punishing the Recusant. And the practice had been always against it, And Coke himself in that case confesseth, that the informer may sue in the Kings Bench Bill, and that by force of the stat. 23, he might before. Now it is clear, that if a man at the making of 23, had been convicted of Recusancy, by any other means then by indictment he had not been bound by that law to pay the 20 shillings a month from the conviction, and if a man be now convicted in the Kings Bench by indictment, or otherwise, he cannot be proclaimed, nor otherwise his penalty run on, for it is not within the 3 Clause of that law of conviction by Proclamation.

Waterer versus Freeman.

Mic. 15 Jac. Rot. 1941.

**W**ATERER brought an action of the case against Freeman, and declared, that the defendant had sued out at W. a Fieri fac. upon a judgement, given against him for the defendant, for a trespass in Oxfordshire, in the Kings Bench to the Sheriffs of Oxfordshire who by virtue thereof took goods of the plaintiff, to the value of the damage, and so made his return, and that the goods remained in his hands pro defectu emptoris, and that the defendant well knowing this (to the intent to bar and double charge him) afterwards did sue out another Fieri fac. to the same Sheriffs, and delivered it to him to be executed, who did thereupon levy the money of other goods of the plaintiff and paid it over to the defendant, whereby the now plaintiff was double charged, whereupon the defendant pleaded not guilty, and it was found against him.

Now Harris moved in arrest of judgement that the action would not lie, being for a legal suit, by the party interested himself, though the cause of action were false; and so known to the party himself, and cited to his purpose 2 R. 3. 9. 5 E. 4. 116. & 21 E. 4. 22. Chibborn argued to the contrary & cited Gerard & Dickenfon Col. 4. that it is actionable if I pretend a title to another mans land, though it be for my self, if I know it certainly to be false, also he cited M. 43. & 44. Eliz. Bray versus

Middl  
Action upon  
the case for  
double execution  
sued.

2. Fieri fac.  
executed upon  
one judgement.

\* But *Quere*. for Modie himselfe tells me that he suing for tithes as a Farmor of the perionage of Woodchurch in Kent, such an action upon the case was brough, whereupon he Demurred, and the Court misliked the action and so it rested without any farther proceeding.

Midd.  
Brownlow.  
Debt against a Sheriffe for money taken in execution, and not answered.

versus Partridge in Ble Roy Action upon the case, for suing in the spiritual Court for Tythes, against a composition made by himselfe. And a like M. 4 Jac. by the Lady Waterhouse, against Moodie for a suit in the spiritual Court for tythes of trees not Tythable. But note that Gerards Case is not of a suit in Court, but of idle speech, and the other two Cases are of suits Coram non Judge, and so no legall nor just suits in effect. See 8 E. 4. the like, in forme as Buckley and Woods case, if one by Bill in the Star Chamber, will charge another with Tythes, or felony, and both plaintiffe and defendant are punished by ordinance of law by Amerciament, as well for false defence, as false complaint. And by like reason, he that should defend a suit unjustly against his knowledge, should be subject to an Action of the Case. Vide Residuum infra.

### Speake versus Richards

Tr. 15 Jac. Rot. 1968.

Debt.

**H**ugh Speake brought an action of debt of 523 pounds, 17 shillings against Edward Richards, late high Sheriffe of the County of South-hampton, and declared that one Paraniour and others were bound by recognizance in Chancery in 200 pounds to the plaintiffe, and that after other process and judgement to 14 Jac. the plaintiffe sued a Levari fac. to the defendant returnable 17 Mich. which was delivered 1 Aug. whereupon the defendant leaved the summe, and at the day returned that he had levied the same summe, Quos paratos habeo, and yet did not deliver it in Court, per quod &c. The defendant quoad 308 pleaded nihil debet, whereupon the plaintiffe took issue, and as to the rest he pleaded, that after the making of the writ, and before the returne, scilicet 31 Aug. he did pay unto the plaintiffe the same summe, whereupon the plaintiffe by his Assignee the same day reciting that he had received it, did acquit him of it, whereupon the plaintiffe declared in law.

The first question in this case was, Whether the action of Debt would lie, because there was no contract between the plaintiffe and the Sheriffe. But that was resolved by the Court that it would lie; for though there was no small contract, yet there was a kinde of contract in law, so it is ex quasi contractu. And therefore upon damages recovered in an action of trespass the plaintiffe shall have an action of debt; and by the same reason when the money is levied by the Sheriffe to as the action consists against the defendant, the same action is ipso facto by law transferred to the Sheriffe having both the judgement to make it a debt, as before; and the levy to make him answerable like unto the case of 1 H. 7. of a Wally delivered to the customer, as soon as money comes into his hands he is made a debtor. Quere if an action of debt, may not be had against the executor as a principal debtor, declaring of a Devastavit by him. Debt lies by Corporations for the penalties forfeited upon their lawes, so for amerciaments in the Court, Barons, so 11 H. 7. 14. for 3 pound forfeiture, upon a custome for pound breach, & 34 H. 6. 36. & 9 E. 4. 30. It is holden that upon such levies by the Sheriffe appearing upon record the Court may award a Distingas, or the party may have a Fieri fac. or Elegit against the Sheriffe to levy as much of his owne, see Mich. 8 H. 8. Reports Crooke 187. That O. N. in the Exchequer makes the Sheriffe debtor to the King, and the Debtor himselfe debtor to the Sheriffe. And though an action of account will lie properly in this case, yet the same case will many times beare both actions, though the money be received per assu maino or the like. But then the action of account is necessary, when the first receipt ab initio was directed to a merchandizing which makes uncertainty of the neats remain till account finished, or where a man is charged as Baptiste of a Manor, or the like, whereupon the certainty of his receipt appears not till account, yet even in the case of merchandizing an action of debt will lie for the summe received before the merchandize, yea and after the merchandize so far as he hath not so employed; and therefore if I deliver an 100 pound to one to buy cattell, and if he bestow 50 pound of it in cattell, and I bring an action



action of debt for all, I shall be barred in that action for the money bestowed and charges etc. but for the rest I shall recover.

Another point was urged for the plaintiffe, that the defendants plea to the 308, lib nihil debet was naught, because it was directly contrary to his return of 308d; but that was answered that since they have not relied upon the estoppel, but taken issue, that could give him no advantage.

Estoppel requires a Relier.

A third point was urged for the plaintiffe, that since the defendant by his return made 15 Mich. had charged himself with the whole money paratos then to be delivered to the plaintiffe, he cannot now say that it was paid and acquitted before.

Also before the return of the writ, he was not debtor to the plaintiffe, and therefore a release to him was void, so upon indictment by conspiracy release before acquittal will be void. But this the Court adjudged for the defendant, in as soon as the money was received by the Sheriff he was presently debtor to the plaintiffe, and releaseable, and since he hath by his demurrer confessed his acquittance, the Court can never give judgement for him upon pretence of his estoppel.

Release to the Sheriff by the plaintiffe after the debt levied is good.

But now I move a question, if a Sheriff having a fieri facias or capias ad satisfaciendum pay the plaintiffe his money of his owne, whether he may now keep the money of the defendant after.

Cranley versus Kingswell.  
Pasch. 15 Jac. Rot. 710.

Replevin.

Southampton.  
Brownlow.  
Rent service tendered at the day of payment, upon the land, yet the Lord may distrain without a personall demand.

Cranley brought a Replevin against Kingswell for taking his Cote at Liff. in quodam loco, &c. the defendant avowed because that place (inter alia) was holden of him as of his Manor of Liff. by 10 Shillings rent at Mich. and at Lady day and because ten Shillings was behind at our Lady An. 14. he distrained; the plaintiffe making himselfe tenant to the land, pleads that the same Lady day he was before sun-set, and so continued, &c. upon part of the land so holden and offered to pay the rent to the defendant, but neither he nor any body in him was there to receive it, and that it was never after demanded of him. The defendant replies, that after the same feast and before the distress he did demand the rent at a part of the land so holden, and that because it was not paid, he distrained.

Whereupon the plaintiffe demurred in law and judgement was given for the Plaintiff. For it is cleare first that the rent remains due still, and the rent is not a duty personall, as is an Homage which must be demanded of the person. Also, the tender is not materiall in this case, because the demand must precede, and the issue must be taken upon that; for, if there be no demand there can be no damage required.

Now the distress is both a demand and a distress, and if the Tenant be there to offer the rent, he may not distrain, and therefore, the rent being due, and the land answerable, he may demand it when he will at the land. But where a person or reentry is joyned to the thing, there you cannot take advantage of the pain or forfeiture, without a demand at the very time prefixt. And the mischief were great, for by this conceipt if the Lord did not demand his rent at the very day, he should never distrain after, without an actual demand of the person of his tenant. But if the tenant tender his rent at the day, or after to the person of his Lord, and he refuse it, I am of opinion, that he shall not after distrain without a demand of the person of his Tenant, but the case of a rent seek Maunds case Coke lib. 7. 29. differs, for there if the rent be not demanded at the day it must after be demanded of the person, for there is no remedy for that rent, but an Assize. Now a distress, a man cannot be, nor damages laid upon him without a willfull fault.

Browne

Replevin.

Browne versus Dunnery.

Trin. 15 Jac. Rot.

Waller.  
Glouc.  
Rent granted  
with a distress  
si legitime peti-  
tur requiritur  
an actuall de-  
mand.

**B**Rowne plaintiffe against Dunnery, for taking his Cows, first Sept. 14 Jac. At old Sudbury, the defendant makes cognizance as Bapliste to Margaret Waller Administratrix of Robert Waller and shewes that one Warner was seized of the land, and granted a rent of 6. pound out of it to the same Robert Waller and Margaret for the life of Margaret payable at Michaelmas and our Lady day, or within ten dayes after. And further granted that if the rent should be behind by the space of 10 dayes after any of the feasts existen, legitime petir, that then he should forfeit 10. by way of paine. Et quod tunc & toties, it should be lawful for Waller and his wife, to distraine and detain until the said rent and paine should be satisfied. But then shewes that 54. pound, for 9. whole yeares in the life of Robert Waller, ended at the feast of Saint Michael. an. 13. were unpaid, and that therefore he distrained for them, being so behind. The plaintiffe denyed the seisin of Warner, which was found for the defendant.

Now in arrest of judgement it was excepted, that the rent incurred in the life of Waller, did not belong to her, as Administratrix, but as in her owne right.

To which it was answered, that shee might waive the grant to her selfe. But that answer would not serve, for then she must have pleaded so as to bring her self within the Stat. of 32 H. 8. to distraine for arrearages after the estate ended. But I gave another answer, that since it appeares, that she might distraine in her owne right, and not as Administratrix, the cognizance might stand well as her Bapliste, and the rest surplussage and void.

Another exception was, that the nine yeares rent could not be due at Michaelmas, because of the 10. dayes given. But that was answered, that it is averred, that the whole rent was behind at the time of the distress which was long after.

But the great exception was, that it was not averred, that the rent was demanded before the distress (as they say it ought to be by the expresse Clause) Whereupon these things must be agreed clearly, that the clause of distress is no otherwile to be extended, then as the grantor gives it, and therefore if the Clause were if the rent be behind, being demanded at another place besides the land, or of his person, then he may distraine clearly, then he could not distraine without such a demand made first, for there the demand is other then the law requires. But where the Clause is no more, but if the rent be behind being lawfully demanded, then he may distraine, it is no more then the law speaks, and therefore the distress implying a demand, and distress; one before another, by operation of law, satisfies it. And so here it was adjudged for the defendant, But if he would have distrained for the paine, he must have made his demand actually of the rent at the end of the 10. dayes, for then that grew due. And I am of opinion, that he must have made another demand of the paine it selfe, (Quare for the distress will serve for demand of that) which must be after that is growen due, which is not till the 10. dayes be incurred, so that is not till the eleventh day, in the end of which day I hold he must demand it, for the whole day is given to the payer without fraction, and though the clause of distress be not severall one for the rent, another for the paine, but as it were joyned for both, so as literally taken, there could be no distress for the rent except there were also a paine forfeited and distress for both, yet the law will divide them, and distinguish their demands according to their natures.

Surplussage in  
plea.

Demand of  
paine, when it  
shall be.

Madox Versus Young.

Debt.

**M**adox brought an Action of Debt against Young late Sheriffe of Barkshire upon a judgement of threescore pound recovered against one Goughe, whereupon he was taken in execution by Capias utlagatum, within the yeare, and escaped. The defendant pleaded nul tiel Recoꝝd of the Recovery, the plaintiffe demurred, conceiving that he should pleade nihil debet. But judgement was given for the defendant. For the defendant may in Debt upon an escape plead nul tiel Recoꝝd.

Parkhurst Versus Powell.

Cafe.

Mich. 15 Jac. Rot.

**P**arkhurst brought an action of the case against Powell late Sheriffe of Denbighshire, and declared that where he had Recovered against one Richard Owen in the Common Pleas forty pound debt, &c. and Owen was outlawed, That the plaintiffe delivered a Cap. utlagatum against him to the defendant then Sheriffe, and that he having bin in his presence would not arrest him, being required, and returned the writ Non est inventus. Upon issue not guilty, it was found against the defendant. And it was moved in arrest, that this Action should not have been laid in Middlesex, because the fault which was the not arresting him was in Denbighshire, yet judgement was given for the plaintiffe for the false returne which is in the Court in Middlesex was also a wrong; so the plaintiffe hath his Choyce.

Mid Execution of divers Counties to lay actions.

Michell Versus Mortimer.

Replevin.

Mich. 15 Jac. Rot. 727.

**M**ichell brought a Replevin against Mortimer, and issue was taken whether one John Michell and all those whose estate, &c. had used to have common for all their beasts levant and couchant upon a messuage, 200 acres of land, 50 of meadow, and 50 of pasture in foure townes, the Jury finde that the said Michell was seised of the same house, land, meadow, and pasture in the same foure townes, but that he had his Common as belonging only to the messuage and 200 acres of land, 20 of meadow, and 20 of pasture in two of the townes, and not to the rest, whereupon judgement was given against the plaintiffe as failing in his prescription.

Prescription mislaid.

Parry Versus Paris.

Information.

Pasc. 15 Jac. Rot. 1781.

**P**arry informed against Paris for non-residence, the defendant pleaded another Information in the Erchequer exhibited there 28 Aprill. Anno 14. for the same absence, upon issue Nul tiel Recoꝝd, it appeared that the Information in the Erchequer was exhibited 29 Aprilis in the same yeare, and was for the matter right. Whereupon judgement was given for the defendant.

Record fayles or not.



Welby Versus Canning.  
Mich. 15 Jac. Rot. 2167.

Scire fac.

Bayle. The rendering of the body must be of record, and how it must be done.

**W**elby brought a Scire fac. against Canning upon a recognizance of bail of six hundred & sixty pounds for one Davenant, and shewes that he had judgement Mich. 4 Jac. against Davenant, and that he did neither render his body nor satisfy his debt. The defendant pleaded that after the judgement, scil. 23 Jan. Anno 4. Davenant came into Court and rendered his body to the prison of the Fleet in execution and in discharge of his bail, and that the plaintiffe did refuse to take him in execution, and the plaintiffe denied the yielding of his body and so a issue. But it was resolved by the Court that this was ill pleaded, for the yielding of his body being an act in Court, and in discharge of his bail which is of record, must be it self of record, and therefore ought to be concluded prout patet per record. and that the other plea should have been Nullius in record. But indeed in this case there was no record entered of it, and yet it was proved by the oath of Calwick the Attorney, and another in open Court that Davenant came in for that and other causes, and was committed to the Fleet and after set at large. And in this case divers presidents were shewed for the manner of the entry upon the yielding of the body upon the bail, scil. P. 12 H. 8 Rot. 324. & P. 29 Eliz. & Tr. 20 Eliz. Rot. 125. between Young and Thomson in exoneracionem manucaptorum & postea, because he was not prayed in execution by the party he was discharged. Et P. 6 Jac. Rot. 105. such a yielding of the body was entered in exoneracionem manucaptorum. So the true forme is, that the entry be made of record of the yielding in discharge of the bail. But then if the plaintiffe or his Attorney be present, he must make his election to take him in execution or to refuse him, whereof entry also is to be made. But (if he be absent) the party presently must not be discharged, because the time of bringing him in is uncertain, for they receive him, if he be brought in at any time before the scire fac. against the Bail, or upon the returne of it, and therefore he must be committed, that the party may have time for his election. But then when he is committed, the use is by rule of Court to call in the party, or his Attorney to take or leave him, and so to enter his Acceptance, or refusal of Record. But this is not a judicall way, for if the plaintiffe, and the Attorney be both dead or in such like case, there must be a means by record to enforce an answer: which I suppose must be by Scire fac. to the plaintiffe or his executors, to answer whether he will have him in execution or not. And I am of opinion that though a man refused thus to take the defendant thus in execution upon his yielding, and that entered upon Record, yet he may after take him by Capias ad satisfaciendum, for it is but a forbearing for the time to receive him upon his own offer, for it is not a renouncing or a releasing of his own Act of execution, when he shall see cause; But the principall Case I ended between the parties arbitrable, and gave unto Welby 20 pound from Canning the bail, and left him nevertheless his remedy against Davenant the principall, for his whole Judgement being 268 pound.

Norris versus Staps.

Pas. 14 Jac. Rot. 907.

Corporations have power to make lawes, and the validity of them.

**N**orris and Trussell Guardians and the Fellowship of the weavers of Newbery brought an Action of debt of five pound against Staps, & declared that Anne Elizabeth incorporated them an. 44 by that name, and gave them power to make lawes rationi consonas, and not contrary to the lawes & statutes of the Realme, with a proviso to the same effect; and that the Queene by the same letters Patents did ordaine for her, her heires and successors, that none should exercise the trade of weaving within the said Towne, except he were first admitted thereunto, by the Guardians and society of weavers. And then shewes the Act of 19 H. 7 and

and then that two Cardians, and the greater part of the fellowship of weavers did make an ordinance; that no person should use the said Art of weaving within the said Towne, except he had been an Apprentice to the Art within the said Towne, and had used it there by the space of five yeares before the Ordinance, or were admitted by the Cardians and fellowship, upon the paines of 20. Shillings a Month. And then betwix the Allowance of the same Ordinance according to the law of 19 H. 7. and that one of the Cardians gave notice of it to the defendant, and then shewes that the defendant had used the Art &c. there by the space of five yeares after, whereas he had not been an apprentice there, nor used the same Art there five yeares before the ordinance, nor was admitted &c. against the said ordinance and the Queenes letters Patents &c. The defendant pleases nihil debet, and it was found for the plaintiffes, and yet judgement was given against them quod nihil capiant per bre. The reason of the judgement, were grosse faults in the declaration.

The first, that it did not appeare that the Corporation did consist of two Cardians, for there was no more declared, but that they were incorporated by the name of Cardians &c. which may be more then two, and they had omitted the clause whereby the number was appointed. I am of opinion that they need not set to shew how they were incorporated, for the name argues a Corporation, as the like of Cities, and the plea nihil debet (or the like) requires proove of it.

But the worst fault is in the law it selfe, for it excludes all Apprentices, brought up in the Towne it selfe, after the ordinance made, which is absurd. Now I am of opinion, that though power to make lawes, is given by speciall clause in all in incorporations, yet it is needlesse; For I hold it to be included by law, in the very Act of incorporating, and is also the power to fine, to purchase, and the like; For, as reason is given to the naturall body for the governing of it, so the body Corporate must have lawes as a politique reason to governe it, but these lawes must ever be subject to the generall law of the Realme as subordinate to it. And therefore though there be no Proviso for that purpose the law supplies it. And if the King in his letters Patents of incorporation doe make ordinances himselfe, as here it was (as aforesaid) yet they are also subject to the same Rule of law.

But the Question which was chiefly intended is indeed great. Whether a new Corporation, having no prescription to appropriate and exclude others, can make a law to exclude all persons: to use an Art or trade in their Towne, whereunto they were not Apprentices within the same Towne, though they served their Apprenticeshoods to it elsewhere.

Wherein the Question is betweene the particular priviledges of Townes and the generall liberties of the people, which is fit to receive a determination, For it runs through the Realme. But this point was not spoken to at the Bench, as not necessary but referred till any other action should require it.

Observe these degrees in the consideration of this case.

First, the common law did not forbid any man to exercise any trade, were he trained or not trained to it, or to exercise more trades then one. But if any man professing a publique trade, would perforce it falsely, or insufficiently, he were answerable.

Secondly, that the law as it now stands, forbids no man to use any trade privately, as to be a Tayler in my house, or the like, for that is not a trade, but a Service, that is at mine owne perill, be it ill or well done.

Thirdly, that the law (as it now stands) forbids no man to exercise a trade publicly, that hath been an Apprentice to it wheresoever. See the case of the Taylors of Ipswich Co. lib. 11. 53. The simple incorporating of a Towne doth not draw by consequence a peculiar trading to that Towne with an exclusion of Forrainers; so then it must be the speciall law or Ordinance that must worke this effect.

Now of that the things considerable in this and the like cases, what Societies, Companies





And it is a general rule for merchants, Embassadors, and the like, who make bills, accounts, and other things in foreign pay: And for the jurisdiction of the Admiralty, see tempore E. 1 Fitz. Avoary, 192. 8 E. 2. Stamford 45 E. 3. 7 R. 2. title *transpasse* Statutum R. 1. 691 R. 4. 15 H. 6. and where the R. 1. 691 is primor pencey that is to be done and done of many matins (as the Statute this) not for actions, but for the jurisdiction and authority of the Admiralty to give

1. The first part of the book is a general introduction to the subject of the history of the United States. It covers the period from the discovery of the continent to the present time. It discusses the various stages of the country's development, from the early years of settlement to the present day. It also touches upon the major events and figures that have shaped the nation's history.

And so the libell is to the Admiralty both and mine lay the same of this paper  
claim more, which argues that that is a necessary point; for the jurisdiction  
now groweth not from the cause as at law and judgments in the High Court  
Court; but from the place: And therefore I hold of opinion that the contract there  
made is truly at sea, and a full breach that of the Admiralty Court, and such  
jurisdiction is also generally without saying any more at all; the prohibition  
will lie; for the libell must warrant the full and full, though you may on the  
contrary part, surmise that the contract was inland: And against the libell: that  
lays it on the sea. And I hold it also not sufficient for the libell to lay it infra  
jur. mar. generally, but it must be so that as it may appear to the Kings Court  
to be so indeed.

## Abigone Versus Clifton.

The sale between the E<sup>d</sup>w Abigayle HATHORN, and the E<sup>d</sup>w Clifton, parties  
want in the Chancery, concerning a promise supposed by the plaintiff to her de-  
fendant of assurance of lands upon the marriage of his daughter; which said  
promise was made to the E<sup>d</sup>w Clifton, and his wife; who being by his father's will  
for his share specially certified to the said E<sup>d</sup>w Clifton, and also to this the  
summe and substance of the promise as it was made by his mother; thereupon  
the said E<sup>d</sup>w Clifton gave to the E<sup>d</sup>w Abigayle 18000 pounds in full of all  
her share in land which he had promised; which certificate was allowed of  
in hearing for a proof without objection to such.

Countesse of Exeter Versus Lady Rosse.

♂ 2 CONTRA.

¶ The case between the Countesse of Essex and the Lady Rosse, there was no intention to have had the cause heard at Councell Table. But the Justice and I being called to the question betwix the King, delivered our opinion, that since it was a cause in his nature fit for the Starrechamber being a Court of Justice; and that Sir Thomas Lake on the behaile of the Lady Rosse desired that course, it was not agreeable to law, to examine it at the Councell Table where it could not be vndermined; and where yet those voluntary examinations might intrude and prejudicate the witnesses and proofes after to be taken legally, and clearly, it would make the witnesses on either part brethren and the consequence of that would be that all the witnesses would be parties in their owne suits. But we agreed, (because the King and the parties were so content) that if it were his Highnesse pleased to appoint his learned Councell to examine secretly what his Highnesse should thinke fit, and make it knowne only to himselfe to use as his wisdom should find cause for some speciall purpose, it might well be done, especially the persons being of honour, and the matter of a most scandalous nature. And it was therefore agreed that either partie should be ruled by the Kings rule who should be made defendants. And to all this Sir Edward Coke being present, did agree.

## Lord Chancellors Cafe.

Lord Chan-  
cellors presen-  
tation to a  
benefice above  
value.

The late Lord Chancellor presented to the Benefice of Stabridge being of the value of  $\text{£}40$  come to the King by a lease, being the inheritance of the Earle of Castlehaven, and the Clerke was instituted and inducted; whereupon obtained a new presentation from the King, who required the opinion of the Chief Justice, Chief Baron, and myself upon it. And was certified that the first Clerk being inducted could not be removed by law, for the presentation to under the great Seale and by the King in law being in his name, and there is no difference in the forme when it is for the King or for the Chancellor, saying that for the most part the one is mandantes, and the other is rogantes. The consi- on of which words is of no moment. But if the presentation is false under the great Seale had recited that the Benefice had been under the value of 20 pound, in which the Chancellor was (as it was said) absolved by a false note brought in from the office of first fruits, it had been hold, for the descent appearing upon record. (And therefore it were not amiss, that clause were inserted in the Chan- cellors particulars) or if the Clerk had not been inducted, the King might have revoked it. 38 E. 3. 4. the like case.

## Hare and Leisure.

Office of the  
Clerke of the  
Court of  
Wards granted  
but to one year  
with a New  
obstante.

John Hare and Nicholas Hare his sonne having a joynt Patent of Clerks of the Court of Wards with an express provision that if one of them should dye, that the other should enjoy the whole non obstante the Statute, John Hare being now dead, said Stephen Leisure moved the King, that he might be joyntly presented to Nicholas the survivor, upon opinion that by the words of the Stat. 3. H. 8. (viz. that there should be two Clerks to be named by his Highness to be Clerks of the said Court.) This was referred by his Majesty to Viscount Wallingford, myself, and Sir James Lee Attorney of the Court; and we certified the King (having heard the Counsell and seen the former grants, ever since the creation of the said Court) that the King could not make such a new grant as was desired by law, for since the gift of the Office was merely in the King, and that only merely ministeriall, the King was not bound to the number, but might with a non obstante dispence with it, as he might give alnage without the nomination of the Treasurer, name wherewith without Judges, Commissioners for Admirall Courts without the Chancellor: But the Annotors place being judiciall and appointed to be two, cannot be lesse, because the subject hath interest in the judicature which must be committed neither to more nor lesse then the law of their creation hath established; And the patents of the Clerks have alwayes been some to one alone at the first, others as this and so enjoyed.

## Earle of Somersets Cafe.

Grant of li-  
cence of wines  
forfeites by fe-  
lony.

The Earle of Somerset had obtained a grant of the licence of wines, for years and took it in the name of Sir John Dacombe, in trust for him. Whereupon the King willed the Chief Justice and me to call the Judges, and to give opinion, whether it were forfeited by his Attainder of Felony, which we did, and it was resolved una voce, that it was forfeited, and after resolved so in the Exchequer, in Cases of Chattells reall and personall, and things in action of that sort.

Prises

Prices of Wine.  
The 24 of Dec. 16. Jac.

The Lord Chancellor, Lord Justice Keble, the Chief Justice and myself, met at Yorke house, to set prices of Wine, to be sold both in grosse and by retail, either by Merchants or Vintners.

For our power, of setting prices in grosse, there was no doubt, for by the Stat. 28 H. 8. Rast. Tit. Wines, we are Authorized, and that is in force. But for the retail, it was questioned; for there was one Statute made for that purpose 34 H. 8. which was temporary and discontinued, but there was also a Statute made 37 H. 8. reviving the former Statute of 34 H. 8. but making also an express Act of it selfe, for the setting of prices, as well for retail as in grosse by the said Officers, which at that time was not made temporary; and 34 H. 8. but by consequence was in it selfe at the first perpetuall, yet in the end of that Act, it is said in Rastalls Abridgement that by the Stat. 5 E. 6. it was continued together with 34 H. 8. till the end of the next Parliament, and then discontinued: Now it is true that 5 E. 6. hath such a continuance which as to 34 H. 8. is effectually, but as to the 37 H. 8. (which was before perpetuall) it is sole, neither can an Affirmative continuance of a Statute perpetuall work an Abrogation of the Statute.

But then the penalty mentioned in the Stat. 37 H. 8. is referred to that of 28 H. 8. which was onely forty shillings, upon the pices of Wine sold at the pice limited. For that Statute meddles onely with the sales in grosse, so this Stat. 37 H. 8. hath no certaine penalty for the disordered sale by retail, but that stands upon a simple contempt.

Hicks Case.

P. 16 Jac.

Starchamber

One sent a letter closed and sealed up to Sir Baptist Hicks, which was to deliver to his hands containing many despicable full scandals delivered ironically, saying, You will not play the Game nor the Hypocrite, and in that sort taunting him for an Almes House and certaine good workes that he had done, all which he charged him to doe for vaine glory. Whereupon Sir Baptist Hicks had him in the Starchamber. And now upon the hearing it was resolved, that though it were not proved that the defendant had any way published it, yet the Court would hold Plea of it, and so did, and fined the defendant and sentenced him to weare papers, and to make his submission to Sir Baptist Hicks in Cheap-side, yet an action of the case will not lie in that case for want of publication, but the King and Commonwealth are interested in it, because it is a Provocation to a challenge, and breach of the peace.

Libell ironically  
and by privy  
Letters.

Cocks Versus Darson,  
Hill. 15 Jac. Rot. 519.

Cocks brought an action of trespass of Trover and Conversion of beanes against Darson, and coming to trial at the Assizes upon not guilty, because it was a small cause, the Judge took not the Jury, but directed to move the Court, and so it was, and the case was, that the lands whereupon the Beanes grew, were Lunatiques and Copyhold, and the Lord had granted unto one, the Custody of the land by whose lease and assent the plaintiffe did sow the land. And the Court was of opinion that the Action was to be brought in the name of the Lunatique: for there was no interest gained in his land by this Commitment, and I do not agree that the Lord hath power over the Lunatiques land without a Custom, for the limitation of the Kings power over Freeholds makes not consequence, for though I take the Statute to be but an affirmance of the common law in the case of the King, yet the collateral incidents of estates, as Dower, Tenancy

Actions touching a Lunatiques lands shall be in his owne name.



Tenancy by the Curtesie, wardships, and the like, are not without speciall Custome.

Bidwell Versus Catton.

H. 15 Jac. Rot. 1765.

Case.

Assumpsit in consideration of ceasing a suit not averring that there was cause of suit.

**B**idwell an Attorney, brought an Action of the Case against Catton executor of Reve, and counted, that whereas he had in Michaelmas Terme 14 Jac. prosecuted an Attachment of privilege against Reve the Testator Retornable in Hill. Terme, the testator, knowing of it, in consideration that at his request, the plaintiffe would forbear to prosecute the said writ any farther against the said Testator, the Testator did promise to pay him fifty pound, and then avertes, &c. And after a verdict it was excepted in arrest of judgement.

1. First, that it was not alleged, that the plaintiffe had any just Cause of Action.

2. Secondly, that this Action still remains.

3. Thirdly, that this kind of Action would not lye against an executor, because it is not in the nature of a debt.

Judgement 1.

But the Court nevertheless gave judgement; For first, suits are not presumed causeless, and the promise argues Cause in that he desired to stay of the suit. Quære if the defendant had averred that there was no cause of suit.

2. Secondly, though this did not require a discharge of the Action, yet it requires a losse of the writ, and a delay of the suit, which was both benefit to the one, and losse to the other.

3. Thirdly, it was agreed, that if the Testator promise to build an house, or to doe some such Collaterall Act that an Assumpsit upon that will not lye against the Executor. But the Court held an Action of debt would well lye against the Testator; for this fifty shillings being a summe of money due upon a Contract in which he received quid pro quo; for the forbearing of a suit is as beneficiall in saving, as some other things would have been in gaining. And 17 E. 4. If a man promise a Chirurgion money to cure a poore man, he shall have an Action of debt for it.

Smith & Vxor, Vers. Stafford.

Hill. 15 Jac. Rot. 926.

Assumpsit by a man to a woman to leave her an hundred pound if he marry her, and they marry.

**A**ndrew Smith and Anne his wife were plaintiffes against Richard Stafford the Executor of Jeremie Stafford and declared that upon speech of marriage had between Anne and the Testator, he promised that if she would marry him and be dyed before her, he would leave her worth an hundred pound, and then says that she did marry him, and that he dyed and left her not worth an hundred pound; upon Non assumpsit, and Verdict for the plaintiffe, it was moved in arrest of judgement that the promise was released by the marriage in law. Against which it was objected, that this Action could not rise during the coverture, for it was not to be performed till after the death of him which made the promise, which is true, but yet it is a promise presently, and before the Act came to be performed, so the lien, and binding of the promise is already in force, and therefore without doubt the woman might have released it before marriage by the word promise, not by the word Action, and what might be released actually the marriage releaseth. See Hill. 5 Jac. Rot. 132. In the Kings Bench, Belcher and his wife brought an Action of the Case against Hudson, upon a promise made unto the wife, that if she should marry one Mason at his request, he would give her after Masons death forty shillings, the defendant pleaded that Mason after marriage did release unto him all and all manner of actions, as well reall as personall, and mixt plaints, debts, contentions, claimes, challenges, controversies, variances, and demands, &c. And yet judgement was given for the plaintiffe. For never an one of these words will reach it; the case was compounded, so no judgement was entered. And I was of opinion that by the marriage the promise was discharged (the husband being the

Faron & feme their intermarriage extinguisheth personall suits. It was not moved whether this action would lye against the Executor.

the person liable) though it were true that the action was not accrued in his time, and though by this meanes the promise must be ab initio, (as a like bond should be) inuile, which moued the other Iudges to be of another mind. But the Rules of Law must not be guided by the improbidence of others.

*Crookhay Versus Woodward.*

H. 15 Jac. Rot. 2001.

**C**rookhay brought an action of covenant against Woodward, and declared that the defendant by his deed shewed in Court did covenant with him, that he would satisfie him all such summes of money &c. as Josias his son the plaintiffes apprentice should imbezell from him within three months after Request, and then layes the imbezelling and request, &c. The defendant prayed oyer of the deed, which was entered in hac verba, and there the covenant was to satisfie within three months after request and due prooffe made of such imbezelling, whereupon the defendant tookes issue, that Josias the Apprentice did not imbezill, and it was found for the plaintiffe, to the damage of

Covenant.

And now it was moued in Arrest of judgement by Chibborne, because it appears by the entry of the deed, that the plaintiffe ought not to have brought his action till the three months were incurred, as well after prooffe as after request; whereas the plaintiffe had averred no prooffe in the Declaration: and this exception was allowed as effectuall as if the defendant had demurred; for the whole Case appears to the Court by the whole Record whereof the deed entered is part, as fully as it it had been in the Plea.

But the great question was, How this matter of prooffe should be understood in Law, whether a prooffe in Court, iudiciall, or prooffe out of the Court, and how it should be made: And first, it was agreed by the Court, that the word prooffe generally laid, shall be understood a prooffe iudiciall, by Jury, confession, or demurrer in Court; It was also agreed, that if the forme of prooffe were appointed in the writing otherwise, that should prevaile, as in Golds Case supra, or if it were upon prooffe made by certificat, as is used for Travellers; or by witnesses before two Aldermen, or the like; which appears cannot be iudiciall: which prooffe shall be set down in the Plea, with all the circumstances, and then it shall be put in discretion of the Court, to judge whether that prooffe were competent according to the meaning of the writing. And so no new prooffe shall be made in the present action, and being brought before he ought to have remedy he can have no judgement as in the Warrantia Charta he may. But in the principall case, because the word prooffe is left at large, and may be made in Court iudicially in an Action brought against the Apprentice, before the Action brought upon this Covenant made by another; it may very well in this case be taken of a prooffe by scire fac in Court, and so is every way against the plaintiffe, that hath brought his Action of his owne shewing before he had cause, and so is judged against the plaintiffe in this Case.

Prooffe how to be understood in Law.

Note that a Warrantia Charta, or a Writ of Speane may be brought before the party take losse; but yet he hath Cause of that Action when he brings it, which is that having a Warranty or Acquittall he sues Quia timet to establish the same by judgement, to bind the land of the Warrantor; &c. pro loco & tempore; which kind of Action is but provisionall, not presently remediall, but after scire fac. but the Action of the principall Case being remediall and like unto the Case of a prooffe, of a surmise per Testes, the Court judgeth whether it be sufficient or not.

## Obligation.

## Warley Versus Beckwith.

Hill: 15 Jacobi. Rot. 931.

Arbitrement  
leaving matter  
in suspense.

**D**Ebt upon an Obligation of forty pound by Warley, against Beckwith; the condition was to Rand to the Award of Gibson and Barwick, to be made ante Festum Sancti Andree the Apostle. The defendant saith that they made no Award, the Plaintiffe saith that the Arbitrators aforesaid, reciting others summes of money, allegan by the Plaintiffe, to be due unto him by the Defendant, &c. On the 18 day of November did order, that the Defendant (laterally) should pay nine pounds to the Plaintiffe. And further, that if the aforesaid Defendant, at or before the Feast of St. Andrew the Apostle then next following, should before the said Arbitrators or either of them, dispute the payment of any of the severall summes aforesaid or any part thereof; then so much should be deducted out of the payment of the severall summes aforesaid; & upon that, that they made no Award, after verba for the Plaintiffe, it was moved that the Award was not sufficient, & Curia advisare vult, whether this reservation shall frustrate all reaching to the Award, or whether the Award shall stand, and the reservation be void.

## Deceit.

## Howard Versus Salkeld.

**M**rs Lord William Howard having a judgement in a Cessavit against Thomas Salkeld Esquire, the tenant before Execution brought a writ of Deceit, and because that would not lay Execution, he brought also a writ of Error; and though both writs tended to avoid the judgement, yet because they were upon severall reasons and respects, they were both allowed.

## Kid Versus Chineley.

Tr. 15 Jac. Rot. 2219.

Executors plei-  
ment adm.  
speciall.

Judgement.

**D**Ebt against Executors who Pleaded three judgements of an hundred pound a peece, and that he had paid forty pound in full satisfaction of two of the judgements, and that he hath not now had, &c. præferquam, &c. the said forty pound and twenty pound more, which is not sufficient to pay the other, whereupon the Plaintiffe demanded and adjudged for the Defendant, for it is a pleinement administer speciall.

## Debt.

## Bawtrey Versus Ifsted.

M. 15 Jac. Rot. 3149.

Stat. 2 E. 6.  
for not setting  
out tithes.

**B**awtrey Vers. Ifsted Debt upon the Stat. of 2 E. 6. for not setting out tithes; the Defendant pleaded Nihil deber, and adjudged a good issue.

## Chester &amp; Vxor Vers. S. George

H. 15 Jac. Rot. 1972.

Judgement.

**C**hester and his wife brought an Action of Trespass against S. George: the Defendant pleaded that another S. George was seised and dyed seised, &c. and it came to him in heirs: The plaintiffe replies that before, &c. one Burgeon was seised & made a lease to one Marshall, who dyed Intestate and the Administration committed to the wife Plaintiffe, and traversed the dying seised, and found for the Plaintiffe. In Arrest it was moved, that the Plaintiffe should have shewed the Letters of Administration; but the Court gave judgement for the Plaintiffe, because his possession, which is affirmed by the verba, was his Title, and the Administration was but an inducement to the Traversie.

Drury



Drury against Fitch.  
H. 15 Jacobi.

Case.

Drury brought an Action of the Case against Fitch, for these words, I arrest you for felony, and at the Tryall the Plaintiffe was Non-suite. And now it was said by his Conncell that the Defendant was to have no Costs, because the words were not Actionable, and so judgment was to be given against the Plaintiffe for that and not for the Non-suite. And it was said that it had been so ruled in the Kings Bench: But I was of a contrary opinion, for the words of the Law are plain and general, that the Defendant shall have Costs upon the Non-suite, and the variation is the more grosse, if there were no cause of Action, for else a man might sue with more safety, where he had least cause: And so Costs were adjudged.

Costs against the Plaintiffe upon his Non-suite, where there was no cause of suite.

Sibyll Yardley Vers. Sir Arthur Ingram.  
H. 15 Jac. Rot. 943.

Assumpfit.

Sibyll Yardley brought an Assumpfit against Sir Arthur Ingram, and declared that Sir Edward Grevill was indebted unto her one hundred and fifty pound and that she told the defendant that she would arrest him for it: whereupon the defendant, upon consideration that she would at his instance forbear, did promise to pay her so much, as she should prove due unto her by the said Edward: And that thereupon she did forbear untill this time, and though one hundred and fifty pound were due, and she can well prove it, yet the Defendant hath not paid her, and upon Non Assumpfit, it was found for the Plaintiffe, and after the arrest it was moved, that the consideration was not sufficient, because there was no time of forbearance provided, for so it might be a minute, but I ended the Cause by composition.

Consideration to maintaine an Assumpfit, for forbearance of a suite, not saying how long.

Gussy Versus Pindar.

A Record of a Prohibition was shewed by John More Sergeant, Pasche 14 Jac. Rot. 1918. between Gussy Plaintiffe, and Pindar, Parson of Mortessfont, in the County of Southampton, for Writbes of Willowes upon surmise that they are of use, as Timber in that Countrey: If Willowes grow within the scite of an house, it is waste to sell them, yet if they be sold, I hold they shall pay Writbes. Note the reason.

Dilmes for the Tith of Willows, and averring that they were of use for Timber there,

Blands Case.

Pa. 16 Jac. Rot. 444.

Case.

George Bland brought an Action of the Case, against A. B. for saying that he was indicted for felony at a Sessions holden at And did not averre that he was not indicted, and after a verdict for the Plaintiffe, judgement was taxed, because there was no Averrement ut supra: It was also questioned for the very words, because an Indictment is but a surmise, And did not averring that he was not indicted.

Crittall Versus Horner.

Case.

Crittall brought an Action of the Case against Horner, for saying that he had caught the French Pox, and had carried them home to his wife, and had judgement: The slander is not in the wicked meanes of getting them, but in the odiousness of the infection, as a leper.

## Battery.

## Clasebrooke Versus Livey.

Pas. 16 Jac. Rot. 2313.

Confession of  
Action refused  
after issue joy-  
ned.

**C**lasebrooke an Attorney, brought an Action of Battery, &c. against Livey, in the County of Wigorn: The Defendant pleaded not guilty, which was entered. And now the Defendant would confess the Action, which the Plaintiff was not willing to accept, because the Defendant had some power with the Sheriffs, before whom the inquiry of damage should be. All being on though all the Prothonotaries said, that they had never seen a Confession refused, if it were offered before the Nisi prius seated, yet the Court did in their discretion refuse it; as well because the wounding was grievous, as to avoid error.

## Starchamber

## Wrenhams Case.

Starchamber  
for slanderous  
petition against  
the L. Chan-  
cellor.

It is lawfull to  
complaine to  
the King of in-  
justice.

**Y**Elverton Attorney generall informed in the Starchamber, ore tenus, against John Wrenham for a complaint by him exhibited against Sir Francis Bacon, Lord Chancellor to the King, in a book containing a scandalous content of a Decree made by the said Lord Chancellor against him, for one Sir Edward Fisher. In the sentencing of which cause it was resolved by the whole Court, that it was lawfull for any subject to petition to the King for redress in an humble and modest manner, where he finds himselfe grieved by a sentence or judgement, for access to the Sovereigne must not be shut up in case of the subjects distresses; but on the other side, it is not permitted under colour of a Petition and refuge to the King, to raise upon the Judges or his Sentence and to make himselfe Judge in his own Cause, by proceeding it before the rehearing (as which his title to the King should be) which Wrenham in this case did though his whole book, with the most desperate boldnesse and despicable and blamable words that was possible. It was also resolved that the Justice of the Decree was not to be questioned in this case, for that was not the point now examinable, though in that it did appear that he had done up Lord Chancellor much and great wrong. So he was censured a Thousand pound fine.

This argument  
was, Tr. 16 Jac.

## Anne Needler Vers. Bishop of Winchester.

Hill. 12 Jacob. Rot. 1844.

Quare Imped.  
Waller.  
Surry.

The Stat. 31  
H. 8. of mo-  
nasteries, the  
clause of con-  
firmation of  
grants to, and  
from the King,  
there expoun-  
ded at large.

**A**nne Needler brought a Quare Imped. against the Bishop of Winchester, and George Needham Clerke of the Vicarage of Horley in the County of Surry, and declareth that one Robert Bristow was seised of the Parsonage of Horley, whereunto the Advowson of the Vicarage belongeth, and that the Vicarage aboyded by the death of one Lucas; and that it was then in the hands of Quene Elizabeth, by the Wardship of Robert Bristow, the son of the first Bristow, who presented William Browne, and so conveyed the Parsonage ad quam, &c. by divers meane conveyances to one James Cromer in fee, and that bee the first of January 1601. did grant unto Francis Foxton, the next avoidance of the Vicarage; who granted the same unto Henry Needler, and the plaintiffe then his wife: and that Henry Needler dyed, and that it survived unto her, and then the Church became void, by the death of William Browne Intendant, and so it belonged unto her to present: This being the next avoidance after the grant to Foxton. Needham Pleads in bar an Parsonage imperfonce of the Vicarage, and saies, that King Henry the 8. was seised of the said Parsonage of Horley, ad quam, &c. And that he dyed seised of it, and so makes the descent to King Edward the 6. and Quene Mary, and lastly to Quene Elizabeth; by force whereof she was seised in fee, and so seised, she presented first one Lucas, and then the said William Browne, and now upon the death of Browne, the King presented him the Defendant: At whose presentation

intention he was instituted and inducted, and truthfully without that, that Robert Bristow the father, was seised of the said Rectory, ad quem, &c. as the plaintiffe has alleged; whereupon this is taken, and the Jury finds a special verdict, thus.

That one Robert Southwell, and Margaret his wife, were seised to them and their heirs of Robert, of the Rectory of Horsham, in the County of Sussex, and on 10 day of May 31 Hen. 8. by the deed of that date did give the same Rectory, &c. to King Henry the 8. and his successors. And that King Henry the 8. being seised of this Rectory of Horley, ad quam, &c. by his Letters Patents bearing date 21 Julii, 31 Elizabeth; in consideration, *pro* Recloria de Horsham, &c. *perpetuo* Robertum Southwell, & Margaretam eidem super Regi hereditibus & successibus suis, dat. & concess. &c. *gr.* &c. dedit & concessit *pro* Roberto Southwell & Margaretæ, the said Rectory of Horley: and the Abbouion of the Wearage, inter alia quæ super Monasterio de Horley in eodem Com. de Surry modo dissolut. spectabant, & pertinebant, Habend'. to Southwell and his wife and the heirs of Southwell. And that afterward, that is to say, 26 day Julii an. 31 Eliz. and not before, the said Southwell and his wife came into the Chancery, and did acknowledge their said deed; which deed was afterwards duly enrolled. And then they find a conveyance of the Parsonage of Horley, ad quam, &c. to the said Robert Bristow and his heirs, and so conclude the verdict: That if the Court shall judge that Robert Bristow the father were seised in fee, then they find that he was seised in fee. Et si contra, *non* contra.

And I am of opinion that Bristow was seised in fee, and consequently that judgement ought to be given for the Plaintiffe.

The points are these.

The first, whether the consideration in the Kings grant were true, and good or not.

The second, whether the Kings grant were good, be it that the second consideration were true or false, good or not good.

The first point for more cleare distinction I will divide into two.

The first, whether the consideration were good, if the husband had been seised alone, and the Kings grant had been made in consideration of his Grant alone, no so no other fault but that his gift had not been then enrolled: And I think it had been good even by the Common Law.

The next, whether the joining of the wives grant to the husband, in the point of the consideration hath made the consideration false. And I think it hath, and that neither to be cured by the Common Law, nor by any Statute, that is, the consideration cannot be made a good and true consideration.

As to the second point, I hold the Kings Grant sufficient, notwithstanding that the consideration be false and void, and that only by the help of the Statute of 31 Hen. 8. and this I hold to be cleare and out of doubt.

As to the first point, the Case is, That Southwell and his wife, being seised of the Parsonage of Horsham to them, and the heirs of Southwell did grant the same to King Hen. the 8. and his heirs by their deed, 10 Maii an. 31: and then the King by his Letters Patents 21 July anno 31. did grant this Parsonage of Horley (whereunto this Abbouion of the Wearage belonged) to them and the heirs of Southwell, in consideration of the Parsonage of Horsham, &c. given and granted by them to him, not saying by deed, nor by what meanes.

Then after 26 Julii an. 31 the deed was acknowledged by Southwell and his wife, and enrolled secundum formam Stat.

Upon this Case I am of opinion, that though the deed to the King were not acknowledged, nor enrolled at the time of the grant made by the King, yet the relation of the inrollement and the operation of the Law shall make the consideration true in effect and sufficient, as touching the husbands estate, and the King not deceived; which is the true reason that makes a Patent void, when the King is deceived in the real consideration that moveth and causeth this grant; for when the King makes a grant by the word *ex mero motu*, and yet expresseth a real



reall consideration moving his grant, which is false: *Rotw* (since these are contraries and cannot stand together) the Law shall judge upon the expresse consideration, and shall not regard the clause of *some ex mero more* which is *Clausula Clericorum*, but shall reject that, as the Court doth the opinion of the Jury, when they find the fact and conclude upon it contrary to Law, as in *Amy Townsends case*, & 9 H. 6. *issint nient son fait*.

Considerations  
in the Kings  
Grant at large.

Now for the considerations, they may be false, and yet not defeat the grant; as consideration of money paid, or consideration of service, 37 H. 8 B. *patents and S. Saviours case*, Coke lib. 10. 678.

The reason is not, because the King is not deceived verbally, but because the Law doth not esteeme such a deceit, so weighty, or materiall, as to destroy the grant, much lesse here where the King is not deceived at all in effect: For the King hath the Personage of *Horsham*, &c. and that by the grant of *Southwell*, which was made before the Kings Grant, and must be so pleaded, as made, 10. Maii.

Inrollement of  
a deed to the  
King, how it  
relatech.

And though it be true, that it was not complete, nor perfected for want of inrollement, at the time of the Kings Grant, yet when the inrollement came upon it, it takes his effect, neither from the inrollement nor by it, but from and by the first Act: And therefore between the parties it shall bind to all purposes ab initio, though this be in a collateral respect.

And therefore, I am of opinion that if I give my land to the King by deed, and after charge the land, and then I levy a Fine to the King of the same land, and then the Deed be inrolled, that the King shall hold the land discharged. And *Hinds Case* is not like, for there the latter conveyance prevails because it extinguisheth the use, without which the bargain and sale works not. So 1 Hen. 7. 31. A Feoffment is made to one for life, the rem. to the King the rem. shall take effect, though the inrollement follow long after. So in *Hall and Winckefields case*, a Recognisance acknowledged before me, in the vacation at *Sergeants Inne*, being inrolled the Terme after was ruled, to bind from the acknowledgement.

So P. 15 Jac. Bull sold to *Dimmock* the *Spanoz of Pipe*, *Dimmock* dyed, then the deed was inrolled, yet it was resolved that the heire should be in ward.

So upon the Case of 38 E. 3. 11. of a Feoffment within the view and entree after; and *Bullocks case*, 17 Eliz. of a Feoffment of lands uncertaine with election. For these are not, nor cannot properly be called fictions of Law, but are reall Acts, compounded of some simples, which make not a complete or intire Act, till they come together, and then they make one perfect Act working by their nature ab initio, even as others doe that are in their nature single: But those things are properly fictions in Law, that have no reall essence in their own body, but are so acknowledged and accepted in Law, for some speciall purpose, as *Littleton* tir. releases. He that hath aliened hanging the Writ, may as long as that writ hangs, accept a release of the Demandant, so may a vouchee, after he hath entered into the warranty: For, though they be not tenants, yet the Law and the parties have allowed them as tenants, inter se, for that suite. So 38 E. 3. 29. an infant in ventre sa mere may be vouched.

Stat. 31 H. 8.

But if the husbands grant could not be made true by Common Law the Stat. of 31 H. 8. of *Monasteries* could not help, because that grant by the husband, was made, as in the case appears after the Parliament began 28 Aprilis H. 8. and the Statute only extended to grants made and passed since 4 Feb. 27. Eliz. which must be understood, before this Parliament 31 H. 8. for it is true that all Acts of Parliament have their effects from the beginning of the Parliament, or severall session of Parliament as it is resolved 3 H. 8. B. *Parliament 86.* and in *Paytridge and Crokers case*, *Plow.* 79. except the Act it selfe appoint another terme, from which it is to take his effect.

But the Stat. 34 H. 8. will help it, for that extends to all grants made to the King, from 27 H. 8. till that Parliament and seven yeares after, and helps (amongst other things) want of inrollement.

Against which it was objected withly by my brother *Finch* (whereunto my brother

Maſter Hatton alſo inclined) that this deed was inrolled long before the Statute, and ſo holds its perfection by the Common Law, and therefore neither needed nor could have any aid by this Law, as a deed not inrolled.

But to this, I anſwer, that there was a time when it was not inrolled, and this Statute makes the deed good and effectual, according to the meaning from the beginning, when it was not inrolled, and is all one for this caſe. As if a Statute were made in general, that all grants by the King ſhall be good without inrollement, and then a Grant is made, it is ipſo facto good, by the Statute in all purpoſes, though inrollement follow, by which it would have been good without the Statute.

And though this Grant were good by the inrollement before the Statute; yet it was not ſo to make the conſideration true at the time of the Kings Grant; by want of inrollement then; but, that is the worke of this Statute to make it good ſo, and to that purpoſe.

But now ſo; the woman's Act, I am of opinion that the conſideration cannot be made good and true, neither by any rule of Common Law, nor by any Statute.

For firſt where it was objected that ſince the wiſe had but an eſtate for life in the thing granted to the King, if either the husband ſurvived, or the wiſe diſſeſſed to the eſtate, the King was to enjoy the land abſolutely, by the grant of the husband alone, without the wiſe, as well as if he had ſorued in the fine, and it doth not appeare that he ever did or could impeach the Kings eſtate.

To this I anſwer, that the conſideration muſt be taken as it is, which is not conſideration that the King ſhould enjoy the land, but in conſideration that the husband and wiſe had granted it to the King, which in this caſe is not true; for the wiſes grant is utterly void, but if it had been a grant, though deſeſſible, it might incline to allot it good.

As if the King in conſideration of land conveyed by I. S. to the Lord Treſurer in the Kings uſe, ſhould grant land to I. S. and the land conveyed by I. S. were gotten by diſſeſſin, and the diſſeſſee ſhould enter upon the Lord Treſurer, yet the Kings Grant ſhall ſtand good, for the conſideration was true, and you muſt not ſtaine it beyond the word, by any imaginary intent; for elſe if the land were voided by a wiſt of right, the reaſon were all one, and the conſideration muſt not intend a general warranty.

And therefore in the caſe of Alton woods where the conſideration was the ſurrender of Letters Patents by the husband and wiſe of an eſtate of Freehold, it was reſolved to be good, though it did appeare that the wiſes eſtate could not be ſurrendered, which might be thought the Kings intent mental, but is not the expreſſe legall intent; It was the Kings ſmall intent to have the land by the ſurrender, but he required onely a meanes which he had, and that was onely inutile.

Again, where it was ſenſibly objected, that the King was not deceived in the matter of Fact, but in the effect of Law how the wiſes grant ſhould worke in Law, & ignorantia Juris non excuſat. And then the caſe ſhould be no other than as if the King had ſaid, Southwell and his wiſe have made me a grant, which is indeed void in Law, as to the wiſe; yet in conſideration that they have granted me the land, I grant unto them the Parſonage of Harly, &c.

To this I anſwer two wayes.

First, that ſo; ought appeares to the Court, the King is deceived in the Fact: Firſt anſwer: For his grant is in Conſideratione pred' Reſtoria de Horſham, &c. per pred' Southwell and his wiſe, eidem nuper Regi dat. & conceſſ. So it refers to a grant in general which might be by fine and not by deed at all, much leſſe by this deed.

My ſecond anſwer is, That though the King be deceived but in Law, yet that will not preſerve the grant; for it is not only the fraud of the party that frustrates the grant, as a puniſhment of his deceit: But if it appeares in the body of the Patent, that the King erres in his judgement to his preiudice, that will make the grant void.

Therefore

If the wiſe had had no eſtate at all, nor had been dowable, I am of opinion her void joyn- ing could not have hurt.

The King in his Patent deceived in his ſmall intent.

The King deceived in judging the Law.

Second anſwer

Therefore 18 H. 8. Brooke Patents 104. If the King gives lands to one and his heirs males, it is judged in the Exchequer Chamber to be utterly void, yet it is but error in law, (taking that for an estate in tail, which is by Law a fee simple) and Alton woods case lib. 1. the King being tenant in tail, the reversion to himselfe in fee, gave the land to Wallis in tail, This was adjudged void, not because the estate was mistaken, as in the other case 18 H. 8. but because the King did erre in the forme and manner of the estate, intending that entire which could not be so. And Gawdy is there of opinion, that though the King had rectified his divided estates, yet it could not have bettered his grant. Unto which opinion the two Chief Justices did also agree; and yet then hee had taken knowledge of the fact, and had onely misconceived the Law, that his grant might nevertheless work intirely.

And the Lord Chandos case, Co. lib. 6. 55. is not contrary. The case is, that K. H. 7. gave the Manor of Blunsden to Giles Chandos in tail, and then the King reciting that he had surrendered his said Patent, by force whereof the King was seised in his demesne as of fee, gave the said Manor to him and his wife; and it was holden that this grant was good in Law, to passe the reversion in fee only; whereof two maine reasons were given. First, that lesse passed than the King meant, that is, the reversion in fee instead of the whole estate in fee. Secondly, That it was not made part of the consideration of the grant, and therefore if the grant had been in consideration that by the surrender of the Patent, the King had been seised in fee, in possession, he had granted it againe, &c. it would have been void, and then it had been like the principall case here.

And the same reason that supplies the Kings ignorance of matters in fact, will also excuse his want of knowledge even of the Lawes, in the subtilties of it. For, he studies a greater Art, sc. Arcanum regni, the Art of Regiment, which is Ars Artium, and contains all Arte, as the Common-wealth includes all private societies.

Tu regere Imperio populos Romane memento,  
Hæ tibi erunt Artes, pacique imponere morem.

The wives  
grant not made  
good by any  
Statute.

As touching the meaning of the Statute to this purpose: The purposes of these Statutes were to establish conveyances to and from the King, according to naturall equity secundum æquum & bonum, which is Lex legum, without respect to legall ceremonies. But it was never meant to inable those persons nor their grants, who by naturall defects or disablements, were either by the Law of Nature or the Law of the Land disabled to grant.

Laws of Nature  
are immutable.

And therefore if an Idiot, or Lunatique, or an Infant under seven yeares of age had made a grant to the King, this Statute had never made them good, for jura naturæ sunt immutabilia. And yet it is true, that if any of these had lepped a fine to the King, this had bound, even without the helpe of the Statute. And Mary Partingtons case, Co. lib. 10. 42. it binds them also for the uses thereupon declared by their deed, as being a part of the operation of the fine.

But note the reason, which is not because the Law binds such persons, for therein jura naturæ sunt immutabilia still, but cleane contrary, because the Law finds them persons not so disabled, nor admits the abatement of such disablement, because it is certified by inflexible and indisputable credit of the Judge, that they were perfect and able persons. And so here is a Law of Policy that doth not cancell the Law of Nature, but doth only bound it in point of forme and circumstance, it being better to admit a mischiefe in particular, even against the Law of Nature, than an inconvenience in generall; and it is not the Law of Nature to admit any improbable surmise against Authentique record or evidence. And though it be true that the age of 21 is not set for grant by the Law of Nature: yet because that it is by the Law of the Land, set as the terms and period that the Law of Nature judgeth of disability of spinors, to give or grant; all Statutes of this Land, shall be judged equally in the favour of spinors even to that age, in imitation of the Common-Law except in speciall cases, secundum quid, as an Infant so contract for meere necessities, and the age of 14



for the heire in ſocage, and the age of 12 and 14, for marriage of male and female, and the like.

So then it is apparent, that it is no Argument, that becauſe theſe might by their grants to the King, have bound themſelves ſome way, that is to ſay, by fine, that therefore by what way ſoever it was done, this Statute ſhould make it good. Even ſo I ſay of a woman covert, the Law of Nature hath put her under the obedience of her husband, and hath ſubmitted her will to his, which the Law follows, *Cui ipſa in vita ſua contradicere non potuit*, and therefore will not bind her by her acts joyning with her husband, becauſe they are judged his acts and not hers, ſo, ſhe wants free will, as the others want judgement.

7 E. 4. 14. the wiſe being ceſſuy que uſe, ſhe and her husband ſold the land, ſhe received the money, and they both required the Feoffee, to make estate to the vendee; and yet the after her husbands death was relieved againſt the Feoffee, and might alſo againſt the vendee, if he were party to the uſe.

Yet note that this was in a Court of equity which judgeth *ſecundum æquum & bonum*. Note a conflict of two Laws, of Nature and Equity as it were, but the one is predominant. And yet the Law of the Land for neceſſities ſake, of Commerce and the like, by a Law of Policy, makes hold with this Law of Nature in a ſpeciall kind; and therefore allowes a fine levied by the husband and the wiſe, becauſe ſhe is examined of her free will judicially by an Authentickall perſon truſted by the Law and by the Kings Writ and ſo taken in a ſort as ſole woman, as alſo when ſhe comes in by receipt: But this being but a ſtation of Law muſt not be extended beyond that, that the Law hath granted as a privilege.

ſay moze, if a woman covert levy fine alone, as if ſhe were ſole, this ſhall bind her for the reaſon befoze given, that ſhe ſhall not be received to ſay ſhe was covert, though her husband ſhall; and may enter and reſtoze the land to himſelfe and his wiſe both. 17 E. 3. 52. 7 H. 4. 23. Co. lib. 7. fol. 8. Counteſſe of Bedfords caſe.

But no man will ſay, That if a woman covert would without her husband make a writing of her Land to the King, and acknowledge and inroll it, that this would be made good by either of theſe Laws, becauſe it would be good by her fine, if her husband impugn it not, even ſo the reaſon holds not in the other caſe.

By the cuſtome of ſome Cities and places, an Infant of 15 yeares (ſo in pleading, an age certaine muſt be ſet down, and not left upon telling 12 pence or measuring a yard of cloth, as ſome books are, that the Court may judge it an age of diſcretion; for Cuſtome muſt not deprive the Law of Nature) may make a Feoffment of his land lying there. 6 E. 3. 4. 13 E. 3. Fitz. Dum ſuit infra ætatem. 3.

But if ſuch an Infant would make a grant to the King by deed inrolled, this Statute would not make it good: So if a man and his wiſe paſſe the wiſes land in London, and ſhe be examined (Note, ſo; elſe the cuſtome were void in Law) it binds her by the cuſtome of London. But if they would grant their land to the King by deed inrolled in the Chancery, this Statute would not make it good.

For, where an Act is made good by cuſtome, if that be not purſued it is all one, as if there were no Cuſtome.

To conclude, as this Statute doth not confirme a grant made of that, that is not the Quantity to give, ſo theſe weak persons are owners of the lands to hold and retaine to themſelves, but are eſteemed in Law, as not owners to give them away. And therefore it was a needleſſe explanation in the Statute of wills that Idiots and the like ſhould not be enabled to deviſe.

But of a grant by tenant in tale to the King, the reaſon is otherwiſe, for there is no inſufficiency in reſpect of naturall defect, but a reſtraint by a Statute, where the Common Law did enable.

The objection that was inferred out of the ſaving of the Statute, where

wives were excepted, that therefore they were meant to be bound, moves me nothing: For (besides that it is a weak implicite and indirect inference to let in so great an Absurdity and incongruity of Law) that exception doth not reach unto the wives that are parties, that is, to such as joine in the grant of their own estates, but to the wives of the parties to the grants, that is, having nothing, but as wives title of Dowry, which being a small thing and casuall, they were content not to free the Kings estate of; the words are (other than the parties their heires) and wives. So they put the wife in ranke with the heire.

Now then if this consideration be faulty, as concerning the wife, it will be cleare, that the Kings grant will be wholly void: For, though the consideration consists of divers things: yet it is one entire consideration; the King conceiving that he had the whole estate both of the wife and husband, wherein he is deceived, and taking that for his recompence, is not satisfied without the whole, like unto an Exchange.

If a Lease or Obligation were read to an unlearned man, as under a condition precedent thus: If I. S. and his wife convey unto you their estate, then you Lease unto them this land, or are bound, and indeed the Lease or Bond is onely if the husband alone doe it: This Lease or Bond will be void. Now that a consideration void in part is void in all, M. 15 Jac. Ror. 755. C. B. Swaynes case. The wife being tenant for life, the King in consideration that he had surrendered Totum Statum, granted a new estate to her: judged void, because the estate was not totally surrendered as against her.

Now the second great point is thus, Admitting that the grant to the King were either touching the wife utterly insufficient, or the grant by the husband not so complete at the time of the Grant made by the King, as it could verifie and make good the consideration, and that consequently the King was prejudiced and really deceived, and so his grant were clearly void by the rule of the Common Law, whether it be not made good by force of these Statutes, or one of them; and by which, though the consideration were totally and really false, as this is not.

And I hold that this Grant is made good not by the Statute of 34. But I hold it clearly good by the Statute of 31. Not by 34. because it cures but certaine speciall faults, as mis-recitall, non-recitall, mis-naming, and the like, whereof a fault or false consideration is none.

Now touching the Statute of 31. I must remove certaine objections, without which I cannot bring this case within the reliefe of this Statute.

First, it hath been objected, That this Statute is not a generall Law in this part: For though it be confessed that the purview of this Law that makes grants to the King good, because it is for the benefit of the King is generall, as in the Lord Barkelyes case, and the Wines case, because the Wines censetur una persona cum Rege: Yet the Purview, that makes the Grants by the King good, being to his disadvantage; shall not have the honour of generall notice, which is given to the Lawes that advance the Kings good, for the generall interest that all the people have in him and in his rights.

Another objection was, That the Statute did onely extend to monastery lands, and this Parsonage and Advowson of Horley is neither pleaded nor founde to be such.

As to the first, I grant that one chapter of an Act of Parliament may be both generall and particular, because one chapter may containe divers Acts and Lawes, which may be as severall and sundry in their natures, as if they were in severall chapters. As it is resolved in Dive and Manningshams case, upon the Statute of 23 Henry 6. And therefore you may plead inter alia inactitum fuit, which you cannot plead in case of recovery, because it is one intire body of Record, arising upon one Originall, and ending with one judgement, which neither is nor can be divided.

And the case of the Chancelor and Scholars of Oxford is good in this point.

For, though the Statute of 3 Jac. be generall against Recusants, and namelie in that point, which disables them to present; yet the clause that gives their presentations to the Universities respectivelie is speciall, and must be pleaded or found, or else the Court is not to take knowledge of it: And it is true that this part of this Statute that gives the Monasteries to the King, is one Law, and that other part that makes good grants, to and from the King, is merely another Stat. (as it were) and the two savings for the Duke of Norfolk and the Lord Cobham, in this Act, of 31 Henry the 8. chap. 13. are particular.

But I hold both these Purviewes of Grants to be generall, inasmuch as they both concerne the King in giving and taking, which are relatives, and the Honor and Justice of the King, in performing really the intents of his Grant, both as much concerne him and his people, as both his profit in receiving and enjoying Grants from them. And this distinction as it is without Warrant, so it is too mechanickall and labours more of a Merchant than a King.

As to the case that hath been cited 2 & 3 Ph. & M. Dyer, 129. between Jorgrave and Heydon, where in Assise, issue was taken whether lands were contained in Letters Patents or not, which by the Common Law were not contained, but by the Statute of 4 H. 8. were contained. The Justice of Assise would not suffer that Statute, being not pleaded, to be given in evidence to the Jury, whereupon they found that the land was not contained. Whereupon an attaint was brought, and the Court would not suffer that Statute to be given in evidence to the Grand Jury, which was not given in evidence to the Petit Jury.

Upon this case I hold that the Justices of the Assise did erre in denying the Statute to be given in evidence: For, though it be true that the Court neither med nor can take knowledge of any particular Statute except they be pleaded: For the Allegata to the Court must also be Recordata, yet a Jury may and must take knowledge of any particular Record, either Patent, Stat. or Judgement, if it be given in evidence to them, for that is their Allegata verbally alleged and produced, if it make to the issue. But it seemes they are misled by error of the old books that held a Jury could not find matter of Record: Even as the like error was ancient, that a speciall verdict could not be found, but upon a generall issue, and if this were a speciall Statute, then the Judges did justly refuse the evidence of it to the grand Jury as of any other evidence of Fact or Record not given to the petit Jury.

*Allegata & probata, to the Judge or Jury differ.*

But if it were a generall Law, yet the Judges did discretely and cautelously to barre it to be given in evidence to the Grand Jury, because it was not just to attaint the Petit Jury by that, that by the discretion of the Court was concealed from them: But legally it will be hard to quit a Jury that finds against the Law either Common Law or feberall Stat. Law, whereof all men were to take knowledge, and whereupon verdict is to be given, whether any evidence be given to them or not. As if a Feoffment or devise were made to one imperpetuum, and the Jury should find crosse either an estate for life or in fee simple against the Law, they should be subject to an Attaint, though no man informed them what the Law was in that case.

As to the second objection, that this part of the Statute concernes only Grants made by the King touching Monastery lands, and therefore remedies not this case. I answer it two wayes.

First, that the Statute extends to all lands granted by the King: Next that this doth sufficiently appeare to the Court to be Monastery land.

For the first, though this provision be in the great Statute of Monasteries, (so to it is) which gives colour to the objection, yet the clause to the King is clearely of grants of all kinds of lands to him, and obtained of divers and sundry persons: and therefore the other clause ought in reason to be as large.

And that other clause for the grants to the subject, is also clearely generall, and hath no restrictive conclusion to Monasteries, as hath 1 E. 6. chap. 44. of Chanteries, which is expresse of grants, to and from the King, of those kind



of poſſeſſions only, and therefore obſerve all theſe parts of the Statute 21 H. 8. as to this purpoſe.

The Grants to be perfected are ſaid to be under the great Seale, Duchy ſeale, and ſeale of the Court of Augmentations, which laſt ſeale was by the Statute the proper ſeale for theſe lands.

It names Honours, Caſtles &c. which were poſſeſſions not of Monasteries. And it hath generall words of hereditaments of what kind, nature, or quality ſoever. Again, it hath prohibition againſt want of finding of offices, which are not requiſite in Monastery lands by this Statute, which gives them to the King in real poſſeſſion &c.

My ſecond anſwer is, that though the King find not as part of their heredit the land to belong to Monasteries, yet they find the Kings Patent, which ſays, that it was part of the poſſeſſion of the Monastery of Chertsey, and that is ſufficient, as in Harpers caſe, Co. lib. 11. 25. And if it were not ſo, it muſt come on the other ſide, as there of the wiſe or kinsman, ſo called in the Covenant, to raiſe ſues.

Now the laſt and greateſt Queſtion, (after objections removed) is this; Whether a Grant made by the King by Letters Patents of lands upon a conſideration real, which is paſſed before the Patents and is ſole, be made good by the Law of 31 H. 8. Chap. 13.

And I am of opinion that it is, and for this purpoſe this Statute is to be conſidered in it ſelf, and by conference with other Statutes of the ſame kind, tending to confirmation of Patents.

1. Firſt, the generall purpoſe of this Statute, was to eſtabliſh Monasteries in the King, by Act of Parliament, howſoever they came to him by other meanes; as by diſſolving, ſuppreſſing, renouncing, relinquishing, beſtowing or ſurrender, or by any other meanes &c. or other imperfect or queſtionable meanes.

2. Next, the Law did eſtabliſh them in the Crown, and gives actual poſſeſſion accompanied with all liberties, priviledges, diſcharges of Aithes, and the like exemptions, immunities and other endowments whatſoever, even ſuch as were ſo peculiar and perſonall, as would elſe have periſhed with their body, to which they were firſt appropriated, as appropriations of benefices, and the like.

This care was to make the lands of Monasteries to be the more deſired of the ſubject, which was the Kings purpoſe to invite all men to take of them, and to lay a baſis of riches and commodiouſneſſe upon them; but this was only to bring them well to the Crown.

3. Now the next care was to bring them from the Crown to the ſubject, with as much ſecurity as was poſſible, and that proviſion is couched in this claufe, and is performed in large and ample words, ſavouring of a great deal of bounty and Rogall meaning to the ſubject, wherein there is one particular of favour to the ſubject beyond that, that is granted to the King in the ſame Caſe; which is this.

4. The Statute makes good the Grants to the King, only paſſed before the Parliament, and ſince the fourth of February, in the 27 yeares of the King.

But on the other ſide the Kings Grants to the ſubject are made good, not only thoſe that were paſſed within the ſame time, but alſo thoſe that ſhould be made within three yeares next after: which makes an Argument of great force, upon all parts of theſe Purviſes, that the Parliament intended no leſſe, but rather more ertention of labour upon the words and claufes to the benefit of the ſubject, than of the King.

5. Next, this is a Law of equality between the King and the ſubject, and therefore it is to be ſuppoſed to be carried as in an even ballance of Accompt where the words are equal, and therefore as on the Kings part it is provided, that the King ſhall enjoy the lands by him obtained, notwithstanding miſrecitall, or miſnaming, or non recitall, or non naming, &c. and concludes [or any other matter or cauſe whatſoever in any wiſe notwithstanding.]

6. So for the bechoofe of the subject the clause is framed with as generall termes and clauses, and rather to more advantage to the subject.

For inchores on the things past the recitall is only of things obtained by the King either for money paid, as for land, or other recompence given in satisfaction, &c.

On the part of the subject it is recited gifts of his Majesties most abundant grace, and goodnesse, as otherwise upon divers and sundry considerations, so the gifts are as well strengthened as taken.

7 And againe, where on the things past the particular fault is contained in the very body of the Writiew for the King to be cured though it have also a generall conclusion, as I have said.

On the part of the subject there are no speciall faults mentioned in the Writiew, for the cure, neither doth the recitall rely only upon particular defects in the Kings Grants, but saith [for] the avoiding of the Kings Letters Patents and the contents of the same, many questions might be moved or invented as well for mis-recitall, non-recitall, lack of inquisitions, whereby the things will ought to have been found, and then hath this generall clause [and for] others and sundry other suggestions and surmises, &c.] albeit the words in effect contained in the said Letters Patents, be according to the true intent and meaning of his most Royall Majestie.

Then is the Writiew grounded upon a more generall clause, that the Letters Patents of any honors, &c. (which must be understood and the grants therein contained) shall stand and be good, effectual, and absolute in Law to all respects, purposes, constructions, and intents against his Majesties heirs and successors, without any other licence, dispensation, or toleration of the King, or of any other persons, &c. for any thing contained or to be contained in them. Any cause (note not such causes) consideration of thing materiall to the contrary in any wise notwithstanding.

And then hath a saving of the rights of all persons, other then the King, his heirs and successors, the Governors, Wardens, Stewards, and persons, their heirs and successors; so here you have all the substance of this Writiew, which is indeed in this part an exertion of a Law of naturall equity concerning Grants, whereof the power and Act of transferring things from one to another, is Juris Naturalis. But the formes and manners to be observed in the transferring of them, are Juris Positivi & Civiles, that is, Kingdomes and Common wealths have by Law written or unwritten, entertained severall formes, which are there made part of the substance of the Grant, though still having respect to the institution of naturall equity, they are not materiall but formal; the very matter and substance of every Grant, being nothing else but a Declaration of the owners will, to transmute that that is his to another: So the supplying of the defects of these formes, was the end and purpose of this Writiew.

Of this kind are all those which I will recite, which I call Prerogative formes, which are only regarded in the Kings Grants for defence against abuse and deceit, which in the like case of a subject, are not necessary.

Of this sort are non-recitall and mis-recitall of Letters, which in the Kings case is made a fault, because the Law requires not only that the King be not mis-informed and deceived, but also that he be truly and thoughtly informed of the estate that he grants: And this may be remedied by a Non-obstante, the non-recitall, or mis-recitall, as it is well resolved in Bozouns case, Co. lib. 4. 35. And common experience teacheth. For indeed it is a mere legall Prerogative formalitie.

There are other Prerogative formes (for) they take no effect beforeen subjects that are of more importance, and therefore may be said in some sort materiall, though in respect of the Grant they are not of the very essence of it, as untrue suggestions and untrue considerations past.

As if the King doe grant the Spanes of S. reciting it to be of the value of twenty pounds, or to have come to him by attainder, or to be concealed where it is

Falfe suggestions, and false considerations not cured by Non obstante, but by this statute of 31 H. 8.

See Legats  
case *Co. lib.* 10.  
111. Barwicks  
case *lib.* 5. 93.  
and 18 *Eliz.*  
*Dyer* 351.

of the value of forty pounds or come to him by purchase, that is void by the Law of the Realme, and is not holpen by a Non-obstante, so this case of false consideration by the Common Law, would have made a Grant void against the King: But neither of these faults should make the Grant of a subject void, as will a Deceit in reading or writing to an ignorant man amisse: For that proves expressly his will, not to concurre with the Act, which the Law of Nature requires.

So these being formes of Prerogatives, I hold them clearly supplied by the meaning of this Statute, the rather because they are within the very words of the Law.

For first, (as I have said) the Law doth establish free gifts without consideration, so that consideration was no maine requisite respect to the Statute.

Next it mentioneth Grants made for divers and sundry considerations, and establisheth them all, notwithstanding any cause, consideration, or thing materiall in any wise.

So here you have the fault that may be in a consideration in the Kings Grant, remembered and cured: And in Grants of Abbey lands, the consideration was most ordinarily, part money, part land.

Now the consideration that is remedied must first be taken a consideration expressed, not omitted out of the Patent: For if the King will make a simple grant without any consideration, that is clearly good, *Alton woods Case*; A consideration shall not be extended beyond the Letter. *Coke lib.* 1. 41.

Next, the considerations that are usually in the Kings Grants, are many of them not materiall, whether they be true or false, if they be past, as for services done or money paid, (as before is said.) These therefore cannot be the considerations meant: For it had been in vain to make a Statute to amend that, that was no fault before.

It must therefore be understood of materiall and important considerations, such as is this, especially since the word (materiall) follows in general, which argues all things in the clause to be taken of the like nature.

Next these considerations materiall must be false, so if they be true and just, they need no Statute to make the grant good. So thus it appears, that the consideration meant in this Statute must be materiall and expressed in the Patent, and in deceit of the King.

The same I hold in the Case of false suggestions materiall, that they are also cured upon the same reason, under the words [any cause or thing materiall to the contrary in any wise notwithstanding] the rather also because the very word (Suggestion) is used in the Statute. And I am of opinion that a grant by the King of lands under any of his seals mentioned in the Statute, is made good by this Statute, though the seal be improper, for that land: for the words are that the Kings grant under any of those seals shall be good, according to their meaning against the King &c. notwithstanding any materiall &c. *Dottoy Alkin's case* was that K. H. 8. bargained and sold unto the manor of &c. and all his lands in by Indenture, and by the same Indenture Covenanted to convey the same unto him by Letters Patents, in performance whereof, he made his Letters Patents of the manor, but omitted the clause of all the lands in the Townes; and yet it was adjudged that those lands passed by the Indenture and the helpe of this Statute.

And these are faults that a Non-obstante, any false consideration or false suggestion could not have holpen, and therefore required the strength of a Statute, and the benefit was of small moment and not worth a Statute, that a Non-obstante (which is denied to no man and is in the power of the Attorney generall) could helpe.

Now this Statute hath expressly remedied some faults that a Non-obstante could not have holpen, as namely lack of an Office or Inquisition, whereby the Kings title should be found, which is a mervellous strong case. For there are two kinds of offices, the one of intitling, which this Stat. speaks of, whereby the

What faults a  
Non-obstante in  
the Kings Pa-  
tents will not  
carry.



the Kings title is ſound, and before which though the King have a title, yet the land is ſtill the ſubjects, as where the Kings tenant is attain'd of felony or of Treason, at the making of this Statute of 31 (ſo) it was 33 H. 8. that gave the King actual poſſeſſion upon attainder of Treason) 9 H. 7. 2 Plow. Com. 477. Nichols caſe. Cok. lib. 5 Pages caſe. So here ſo the benefit of the Grants by this Stat. that is made the Kings to grant that was not his ſo himſelfe to retain. Like unto the Prohibition of 1 R. 3. of Feoffments by ceſtuy que uſe, to give that which indeed himſelfe had not; The other Office is but to ſurber and know what the King already hath.

And to conclude. Note that the Statute meant to bind the King abſolutely; ſo it makes the Grants good againſt him, his heires and ſucceſſors, and in the ſerving, excludes them as fully as it both the Abbots, and Biſhops, and the Founders, Patrons, &c. which the Stat. did utterly exclude out of all hope.

Yet are there caſes that may ſeem within the words of this Law, that are not within the remedy: And therefore though I have deliver'd my opinion, that conſiderations materiall that are ſalls, ſhall not vitiate a grant if they be paſt: Yet if a conſideration be preſcribed in the future, and be not performed, it will void the Grant, this Statute notwithstanding.

As if the King ſhould grant his Manor of D. to I. S. in conſideration that he ſhould within one yeare convey unto the King the Manor of Sale; Say more, if it be in conſideration that he ſhall ſerve the King in any Office, or that he ſhall pay unto him an hundred pounds, though theſe conſiderations in time paſt had done no hurt, (as is ſaid) yet in the future they are made materiall, and are out of the meaning of this Stat. which only makes good the Grant, according to the words contained in it.

For this, Wroths Caſe, Plow. 21 E. 4. 48. agrees that if it be a conſideration of ſervice paſt, it is good, and needs no Abatement, eo quod est libera capella, but if it be eo quod relaxavit, it is otherwiſe, ſo that is ſo; his advantage.

And ſo temp. H. 8. Br. Nov. C. 368. the King gives land pro erectione Collegii, & 38 H. 6. 34. Grant by the King ad effectum, makes a condition in the future, and that ſtands with the Grant, and allows it good and perfect at the firſt, but after forfeit by the condition, and therefore out of the reaſon and meaning of this Statute.

On the other ſide by the words of the claſſe of Grants to the King, not naming of the Honours, &c. is reckon'd among the faults that ſhould be cured. And yet I hold that cleare not remedied generally: For that were not only againſt natural equity, but againſt ſenſe to make that paſſe that was never mentioned, and to ſuppoſe a meaning without words, or perhaps againſt words were an unſufferable miſchiefe: And the makers of the Stat. and themſelves intangled with this miſchiefe, and therefore in a kind of implied contradiction conclude againſt it: For, they ſay that the Grant ſhall be good notwithstanding, not naming of any of the Honours, &c. compriſed and mentioned in the Grant. So it muſt be mentioned and therefore cannot be unnamed. Alſo the words are ſo the things contained; ſo the not naming cannot ſtand.

Now to underſtand it not named, that is not particulariſed, is vaine: For if the King grant all his lands, and tenements in D. it is good without quantity or quality, 30 H. 8. B. Par. 95. ſo it is indeed but an overflow of words either not poſſible or ſtriffleſſe.

Again, I am of opinion, That a Grant of the Manor of D. to the King or by him habend. cum Sale, is void for S. ſo a Grant to one in perpetuum gives not ſo by this Statute: For, though there be a meaning in the latter caſe and words in the former, yet neither are perfect and certaine, nor proper to make a Grant; For Sale is not granted. And ſo it is a not naming in effect, and the Statute ſaith, Albeit the words &c. ſo it requires ſenſible and effectuall words and ſentences. And touching the other caſe, the ſavour of a deviſe is peculiar to that kind of conveyance.

Now the conference of the latter Statutes of Confirmations of Patents, and Grants, to and from the King, will make the bounty and liberality of this Statute to subject more evident and perspicuous; For this Statute being found too large against the King, the Statute after made to that purpose for confirmations, went in diminution and abatement as to the benefit of the subject, being pared, and still going lesse in latter times, as Pardons in Parliament al- so doe, against the King.

And therefore 34 Henry the 8. though it have a generall clause of all causes and matters for the King; Yet for the subject, it concludes onely upon the speciall faults particularly set down.

The Statute 1 Edw. 6. of Chantries, the other Statute 1 Edw. the 6. of Confirmations; though it be in one point strange, (for it cures onely grants made by the King, and not to the King) yet it doth not confirme the grants by the King, but for the speciall faults the Statutes, 4 & 5 P. & M. 18. & 43 Elizabeth, have a generall conclusion for the Crowne, but for the subject they extend onely to particular faults. But 18 & 43, Eliz. expressly that they shall be taken with a benefitall construction. And these three later Statutes do extend their benefit and favour to grants made not only to the King himselfe (as the rest did) but also to grants made unto others to the Kings use,

Replevin.

Heard Vers. Baskerville.

Mic. 12 Jac. Rot. 650.

Brownlow,  
Devon.

**W**illiam Heard brought a Replevin against Richard Baskerville, The Defendant, as Bailiffe to John Dinham Esquire, cognovit captionem, for he saith that long before, &c. one Thorne was seised of the place, &c. in fee. And 12 E. 2. granted a rent of two shillings with a clause of distress unto one Millington. And that he dyed seised, after whose death the rent descended to another Millington, as his cousin and heire, till he sheweth how his cousin, and then sheweth that the later Millington 21 Hen. 8. did grant unto one Dinham and his heires the said rent in Exchange; which was executed on both sides. And then conveys the rent down by descent unto Dinham, in whose right, &c. upon which Conians the Plaintiffe demurred generally.

And the only question whereupon the Court stood was, whether the not setting down of the manner of conveyance, were matter of substance, or only of forme, such as by the Statute of Demurrers 27 Eliz. ought to be particularly set downe, or else no advantage to be taken of it.

This case as being of great consequence in the rule was argued by the Judges publicly, and adjudged for the Defendant, Warburton only dissenting.

In this case all the parts of the Statute were considered, The title is for the furtherance of Justice, that is Justice final and definitive, which unto the controversie by deciding it, according to the very right. For every severall Action or suite hath a kind of Justice which may be called interlocutory, in which a man may fail, though his right be good, as for want of forme before this Stat. which bred much charge and multiplicity of suits, and was also a hinderance of that definitive Justice, which this Statute intends to further.

Now the moderation of this Stat. is, such that it doth not utterly reject forme: For, that were a dishonour to the Law, and to make it in effect no Art: but requires only that it be discovered and not used as a secret snare to intrap. And that discovery must not be confused and obscure, but speciall, therefore it is not sufficient to say, that the Demurrer is for forme, but he must expresse what is the point, and specialty of forme, that he requires. And so is the word and meaning of the Stat.

Now then, the maine question is, what is matter and what is forme with- in the meaning of the Law. The Stat. best expresseth it selfe in this, For it divideth it selfe into two maine members, which are membra dividenda.

First, want of perfection of forme.

Second,

Demurrer ge-  
nerall what shal  
be forme, what  
substance.

Second, the matter in Law is very right, Scilicet the true, mere, or very right; to which must be added that which the Statute adds, that this right according to which judgement is to be given, must appeare to the Court within the body of the Record.

So now whatsoever it is without which the right doth sufficiently appeare to the Court, it is soyme within this Law: And so e converso whatsoever is wanting or imperfect, by reason whereof the right appeares not, is not remedied as soyme within this Law.

And therefore if an Executor, or Administrator, bying an Action of Debt, and do not produce his probate or Administration, it is not holpen.

So if a man plead a conveyance of a rent or the like, that cannot passe without deed; without producing the deed in Plea, it is not holpen: For it is not enough for the party, to say that he is Executor, or that Rent was granted to him; but the Court must see and adjudge of it, or els the right appeares not, and the adverse party may cause the deed to be inrolled, which makes it a part of the Plea, whereupon the Court shall judge whether it maintaine the Plea or not.

So if the meanes be wanting whereby the right should be made to appeare, it is uncurable: as if a man bying an Action of debt upon an Obligation and produce it, but lay it made beyond Sea or in no place, a generall demurrer serves. And so; the same reason two affirmatives without a traverse is not holpen, because it admits no trvall without which the Court cannot see the right.

If a man bying an Action upon an Obligation to performe an Award, the Defendant pleads no Award made, the Plaintiffe replies and shewes the Award; now here is a full issue, a Negative and an Affirmative; yet if the Plaintiffe doth not also assigne the breach, the Defendant may demurre generally, yet that breach was not traversable, but the plea as between the parties hath an issue before. And this is but an excrecence or surplusage. But yet because it doth not appeare to the Court that he had right or cause of Action without it, it is matter and not soyme to set it forth for information of the Court. And this is a case of some singularity upon this Statute.

But now to the case in question, the descent to Millington as cousin and heire to the substance and body of the Plea: And the rest which is required under the bill, is but a specification and explication of the same thing by the manner how it is, which is not the point issuable, but the generall descent as it is ruled in the case of challenge for consanguine, 14 Eliz. Dyer 319. 9 E. 4. 3 & 19 H. 8. 7. and note that this is matter of Fact to be tryed by Jury, whether it were pleaded generally or specially: So it is not like the cases of not shewing deeds or the like, whereof we spake before, whereupon the Court is to judge.

Note, Wimbish and Talboys Case, Plo. Wimbish and his wife plead, that she was the person to whom the interest of the land did belong, after Elizabeth Talboys; and the opinion of the Court was equal, whether that were well or not: Yet that was at the Common Law before this Statute, but indeed the Plea, followed the words of the Stat. 11 H. 7. which were in the generall, whereupon they relied that maintained the Plea, and that was lesse certaine then this, for she might be next either by descent or purchase, or by reversion or rem.

Now where it was objected by Warburton, that if the Pedegree had been set down, the Plaintiffe might have pleaded a Release of any of those Ancestors or pleaded Bastardy in any of them: It was answered, that the traverser of the descent of the rent to Millington must have been the issue in both cases, and would have served, and so will, though the Pedegree be not set down.

Note, that as a demurrer at Common Law did confesse all matters formally pleaded, so now by the Statute a generall demurrer doth confesse all matters pleaded, though informally, according to the formes meant by this Law. For such formes are now not materiall not being expressed in the demurrer.



Wast.

Lord Darcy Vers. Askwith.  
Hill. 15 Jac.Brownlow.  
Ebor.General words  
will not give  
leave to sell  
Tymber.

**I**ohn Lord Darcy brought an Action of Wast against Robert Askwith, and John Marshall, upon a Lease made by one Edward North to one Arthur Denly 34 H. 8. of the Manor of Swillington and had generall wordes, Boscis, boscorum vendicionibus, magno macremio, magnis Arboribus, mineris, carbonum, &c. in tam amplis modo &c. prout the Lessor habuit vel jure habere potuit, for the terme of 80 yeares, and conveyed the reversion to the Plaintiffe, and the Lease to the Defendant, and then assigned Wast in selling of Dakes. The Defendants plead that they felled those trees for the making of Punctions, Coyses, Rols, Roll scoops, and other utensiles in and about certain Cole Spines parcell of the demise, and without which they could not dig, and get the Coales out of the pits, and did bestow the same Trees accordingly, whereupon the Plaintiffe demurred in Law.

And first, there was no question made, that the Lessees might sell Tymber, by force of the generall wordes, because those wordes are concluded under a Terme, which argues that it gives not the Trees, as it is resolved 2 Eliz. Dyer, 180. And 23 Eliz. Dyer, 374. but the only question was, whether by implication of the Law, by leasing the Coale Spines the Lessor gave power to sell Trees for the use of the Coale spines. For the grounds was agreed tempore E. 1 R. Grants 41. that the Grant of a thing did carry all things included, without which the thing granted cannot be had. But this case was adjudged by the Court una voce, against the Defendant, for that ground is to be understood of things incident and directly necessary. Thus, if I give you the fish in my waters, you may fish with Nets, but you may not cut the Banks to lay the Water dry. If I grant or reserve woods it implies a liberty to take and carry them away. So the Law that allowes a Fyne leysed by an Infant, allowes him likewise to declare the uses; but in the principal case it was first agreed, that this shall be taken for a spine opened since the Lease, because that is strongest against the Defendant that pleads it. Now then if spines had not been granted by speciall name, it had been Wast to open a spine of new. For, it is generally true, that the Lessee hath no power to change the nature of the thing demised, he cannot turne meadow into Arable, nor stub a wood to make it pasture, 10 H. 6. 1. nor dye up an ancient Boole or Wicary, 5 R. 2. Wast 97. nor suffer ground to be surrounded, nor decay the Pale of a Park: For then it ceaseth to be a Park, nor he may not destroy nor dye away the stock or breed of any thing, because it disherits and takes away the perpetuity of succession, as villains, Fish, Deer, young spring of woods, and the like; but he may better a thing in the same kind, as by digging a meadow, to make a Deyne or Dwyer to carry away water.

A Lessee may build a new house where none was before, but that must be every way at his owne charge: For he must neither take Tymber or other things wastable, neither to build nor repaire it, though it be never so needfull. And yet if he keep it not in repaire, an Action of Wast lyes, though the Writ be in Domibus dimissis, 42 E. 3. 22. 17 E. 2. 17 E. 3. Fitz. Wast 118. 101. And 11 H. 4. 32. But if the Lessor build a house after the Lease, the Lessee is not bound to keep it in repaire, 49 E. 3. 1.

Now upon the like reason, though it were no Wast to open a spine in this case, as it would have been if the demise had not been of spines by speciall name; yet it is like a house new built, for maintenance whereof, the Lessee can sell no Tymber, and so much worse, as a new house better and increaseth the inheritance, whereas the making and digging of spines decays, and perhaps destroyes the Inheritance of the spine. And therefore it is against reason to make one Wast to maintaine another. And so the difference is apparent between this case and the liberties inclusive of Horse-boot, Fire-boot, Wedge-boot. and the like, which all tend to the preservation of the thing demised, and Plough boot depends

depends upon the favour of Willage. This was the judgement and reason of this case, which I did deliver at the request of the rest of the Judges for us all.

And I am of the same opinion, though the Spine had been open at the time of the Lease, and though both Lesor and Lessee had used to take Timber for those purposes; for the Lesor might use his owne as pleased him, and the wrong of one Lessee cannot warrant anothers wrong.

*Vicars and Langham.*

Error.

**A** Writ of Error was brought in the Exchequer Chamber, upon a judgement given in the Exchequer between Vicars and Langham, and the error assigned was that the Sherifffes of London having returned a Jury, and they being called and some not appearing, the Plaintiffe prayed a Tales; And after the Jury made full by Tales, then the Plaintiffe challenged the whole pannell by exception to the Sherifffes, whereupon the Jury was quashed, and a new Jury impannelled by the Cojoners; by which the cause was tryed.

Challenge may be taken to the Pannell made by the Sherifff, after a Tales prayed unto him.

Now the exception was, That the Plaintiffe having prayed a Tales to the Sherifffes and obtained it, was stopped to challenge the pannell for exception to the Sherifffes.

Stoppe blinds not where it is enforced by necessity.

But it was resolved, That there could be no challenge neither to the Pannell, nor to the Poll, till first there were a full Jury, so that the Jury not appearing full, there was a necessity to have a Tales, or else the challenge could not have been taken: And so the cause would have remained pro defectu Juratorum if that the Plaintiffe had not prayed it, for the Defendant would not, and so the judgement was affirmed.

And note that in this case there were none swoyne before the challenge, but only impannelled. But if the principall Pannell doe once appeare full, then the challenge must be taken to the Pannell before any be swoyne or else it comes too late.

Note that where the Plaintiffe sues his Ven. fac. to the Sherifffs he is not stopped thereby, to challenge the Pannell for kindred or other cause that was before the Ven. fac. And though a Jury may be challenged for a Cause happened since he was swoyne, yet the Pannell cannot be so; for no ill affection of the Sherifffs arising since the Jury swoyn, can make the Jury suspected that was impannelled before.

**I**t was adjudged that where one had a common appurtenant to 10 Acres of land for all his beasts, leuant and couchant upon the same, and sold part of it, That the Common should be apportioned and every one should have Common for his beasts, leuant and couchant upon his part: For, there are things entred in severall degrees, some that cannot be divided by any act of the parties, as warranty, conditions, and such others, which yet by act in Law are divided. But the case of Common is not so strict an entirety, and the mischiefs and generality of the case requires an extention for the Common good.

Common appurtenants shall be apportioned upon division of land.

*Countesse of Shrewsburies Case.*

Star-chamber

**I**n the Star-chamber the Countesse of Shrewsbury, Dowager of Carle Gilbert was fined ten thousand pounds & committed to the Tower for that, being called to the Council Table, & interrogated what she knew, or had heard, or thought of a supposed child which it was rumozed that the Lady Arbella should have had, she refused obstinately to make any answer, for it was judged that this was a question of State; for there is not one thing that doth more concerne the peace of a Kingdome than the certainty of the Royall Lyne, inasmuch as suppositions persons have raised as great commotions & troubles in States, as the discords of true betres and descendants. As in the case of Perkin Warbeck, here at home; and counterfeit Sebastian of Portugall, and many others. And so this was an examination

Star-chamber punisheth refusal to answer to the Council in question of State.

mination proper for the Councell Table, and of their Jurisdiction and Cognisance, and therefore to deny to satisfy the King and State in a point wherein they are so nearly interested, is to deny a part of Allegiance, which requires all Duties that tend to the good and preservation of the State, and that no less for the future then the present time. This Lady was the more pressed to answer this matter, because being more familiar and inward with the Lady Arbella, then any other, she must needs have falsified the rumour, for all men of understanding held it to be untrue.

### Traskes Case.

Star-chamber  
punished fac-  
tions and con-  
venticles  
though they be  
upon grounds  
of Heresie &  
Schisme.

**I**n the Star-chamber likewise one John Traskes, a Minister that held opinion that the Jewish Sabbath ought to be observed, and not ours, and that we ought to abstaine from all manner of Swines flesh; being examined upon these things, he confessed that he had divulged these opinions, and had laboured to bring as many to his opinion as he could. And had also written a letter to the King, wherein he did seeme to say his Majesty of Hypocrisie, and did expressly inveigh against the Bishops high Commissioners, as bloody and cruel in their proceedings against him, and a Papall Clergy.

Now he being called Orc tennis, was sentenced to Fyne and imprisonment, not for holding those opinions, (for those were examinable in the Ecclesiastical Courts, and not here) but for making of Conventicles and Factions by that meanes, which may tend to sedition and Commotion, and for scandalizing the King, the Bishops and the Clergy.

Star-chamber

### Countesse of Exeter, Vers. Lady Rosse Term. Mich. An. 16 Jac.

What examina-  
tions bind in  
the Star-cham-  
ber.

**I**n the Star-chamber in the great Cause betwene the Countesse of Exeter, the Lady Rosse and others, because the Lady Rosse and one Sarah Swarton her Maid, had charged the Countesse of Exeter, that she had delivered unto the said Lady Rosse at Wimbleton at the Carles house in a certaine Chamber there, a paper written and signed by her selfe, (as she said) containing a confession of certaine foule faults, and a submission thereupon, which was shewed unto the King. His Majesty commanded Sergeant Crew, and Sergeant Moore of Councell of either side, to go to Wimbleton, and there in the same Chamber, to examine the Lady Rosse, and Swarton, upon all such things as upon their view of the place, they might judge likely to discover the truth or falshood of the same matter; which they did accordingly without Oath. Now the same persons being afterwards examined in Court as Defendants, upon all things that the Plaintiffe liked, they did further examine them upon Interrogatories, whether that Declaration which they had made at Wimbleton before the two Sergeants were true or not, but they did not shew them that Declaration, now, whereupon they answered that they were true.

Now upon motion in open Court, it was resolved that these examinations were not well taken, for no man is bound by an examination in Court, till first he have advisedly read, perused, and extracted it, as he sees cause, and then finally concluded it. Wherefore this being first taken without Oath, there was no reason to bind them to it by a new Oath by memory without rebuts, and therefore by order it was suppressed. Nevertheless because it was like that the said examination might serve the better to discover truth; it was ordered that the same their declarations should be shewed them, and they re-examined upon them. And so they were.



Philip L. Stanhope Plaintife, the Bishop of Lincoln, Miles  
Williams, and James Adamson Defendants in

Quare Imped.

Quare Imped.

P. 14 Jac. Rot. 103 o.

The Plaintiffe declares that the Prior of Shelford, was seised of the moiety of the advowson of two parts of the Church of Rippingale, and one Sir John Denham of the other moiety to present by turnes.

That the Church being full of one Brerely, the Prior with consent, &c. did grant the next advowance unto Bryan Higden. When he shewes the dissolution of the Prior, being under two hundred pounds per annum, by the Stat. of 27 H. 8. whereby the Prior is given to H. 8. and all Advowsons, Rights, Curries and Conditions belonging to the Prior, as largely as the Prior had them: And that H. 8. granted the Prior, the said moiety of the Advowson and all Advowsons, and Hereditaments unto Sir Michael Stanhope and his wife, and to the heirs males of his body, in as large and ample manner and sojme as they came or ought to come, &c. to the King by the Stat.

That Brerely the Incumbent dyed, and one Margaret Brerely (to whom the next advowance was come) presented Robert Collingwood the elder who dyed, and then Lyster who had the Advowson under Denham presented Robert Collingwood the younger, and he dying, now the L. Stanhope, being heirs male presented, and the Defendants disturbed.

James Adamson, as Parson impetroner of the presentation of Williams, after some protestation for plea, saith that King H. 8. Non conc. prefato Michaeli Stanhop & Anna uxori ejus pred' medietatem pred' duar' partium Ecclesie pred' modo & forma prout, &c. whereupon they are at issue.

The Jury finde that Henry late Prior of the late dissolved Prior of the blessed Mary of Shelford, was seised of the Advowson of the two parts of the Church of Rippingale, to present in every other turne in the right of the Prior, ut de uno grosso in feodo, &c.

And that one Sir Henry Gray Knight, was seised of the other moiety of the Advowson of the same two parts of the Church aforesaid, that is to say, to present to the same Church aforesaid, in every other turne being void, ut de uno grosso in feodo, &c. And that the Church became void, and that the aforesaid Prior presented Rob. Ednam to his Turne, in the time of R. 3. who was admitted, &c.

And that the Church became void by Resignation of Rob. Ednam, by reason whereof Henry Gray presented in his Turne one Tho. Dixon, his Clerke, who was admitted in rempoie H. 7.

And that predict Prior, 6 Aprilis, 21. H. 8. granted unto Brian Higden, &c. The first and next Advowson of the said two parts of the Church aforesaid: By force whereof, the said Brian Higden was possessed, and the Church became void by the death of Thomas Dixon.

And that 25 H. 8. James Foljambe, having no right, &c. by usurpation upon the said Brian Higden, &c. Presented Edward Brerely his Clerke, who was admitted, 25 H. 8. and continued Parson of the said Church until the time of Q. M.

And the said Edw. Brerely being Parson, and Bry. Higden, &c. being possessed of the said Advowson for the first advowance thereof, de jure & de titulo, and the aforesaid Prior being seised, &c. of his said moiety of the Advowson of the said two parts of the said Church sine de jure aut titulo prout Lex postulat.

When the Stat. 27 H. 8. for the dissolution of Religious houses, not having lands to the value of two hundred pounds per annum, gave the said Religious houses, & Jura ingressus, conditiones, &c. to the Sponssories belonging to the King, and finde that Shelford had not above two hundred pounds per annum, by reason whereof the King was seised prout Lex postulat.

And afterwards King H. 8. by his Letters Patents dated 5 February anno.

31, regni

Brownlow  
Lincoln.

The lessee of a  
Prior suffers an  
usurpation, the  
prior is dissol-  
ved, the King  
grants the  
Advowson.  
This argument  
was Mic. 16. 1gr.

31. regni sui, granted the Manor of Shelford, with the appurtenants and all Rectories Withes and hereditaments in Rippingale and other places to the said late Monastery belonging in as ample manner and forme as they came, or ought to come to the King by the said Stat. excepting the Advowsons of the Vicarages of Churches whatsoever of the premises not appropriate, To hold to them the said Michael Stanhope, and Anne his wife, and to the heires males of the body of the said Michael Stanhope, and it upon the whole matter, *ic. quod conc. tunc concessit, & si non, &c. tunc non concessit.*

And I am of opinion that this Verdict is against the Plaintiffe, and so hee ought to be barred.

For the more cleare carriage and distinct understanding of my opinion in this case, I will make it into 3 points.

1 Point.

The first, whether the Manor in whose time this usurpation upon Higden the grantee was, or his successor after him, if the Monastery had stood, should have had the Advowson it selfe, or a Quare Imped. upon the next avoidance, or must have been given to his Heir of right to recover it, as the case appears, and as it is found in this Verdict: for if he were given to his Heir of right, then the King could neither take nor give this Advowson.

And as to this point, I hold the Verdict uncertaine, and therefore if there were no other thing to warrant judgement, it would require a Ven. fac. de Novo.

2 Point.

Secondly, admitting that the successor might have had a Quare Imped. yet whether the King upon the Statute of dissolutions, may have the same remedy upon the next avoidance: and I think he might.

3 Point.

Thirdly, admitting the King might have had that remedy by force of that Statute: Yet whether the grant of King Henry the 8. in such sort and by such words as it is doth give the Advowson or Action for it, to Sir Michael Stanhope, or his heires, either by the Common Law or by the help of the Stat. of 27, or 31 H. 8. of Monasteries, and I think it doth not give it.

1 Point.

As to the first great point, I will consider the Statute of W. 2 cap. 5. distinctly upon three simple and severall points, which fall out directly into this. First, what persons are relievable by it, and what not.

Secondly, in what cases, and what not.

Thirdly, in what manner, and by what means.

To the first, what persons are relievable.

First, heires themselves, and those within age (upon usurpation had upon them) were given to their Heir of right before this Statute at the Common Law, as appears first by the Statute it selfe, which is expresse so, and also in 31 E. 1. Fitz. Qu. Imp. 186. where the plaintiffe in a Quare Impedit, counted of a presentment in the time of R. 1. the defendant being a Prior said, that he and his predecessors had presented four persons last. The Plaintiffe replied that they were in the minority of him and his Ancestors, and it was adjudged against the Plaintiffe, because he had no Heir, but had suffered usurpations before the Statute, and yet it was in case of Descent, and so the opinion is cleare in the case of 35 H. 6. 60. and Boswells case Co. lib. 6. 49. resolved.

And therefore, there are no persons relievable but those that are heires, or in degree of heires, that is, in by Inheritance and descent of the Advowson warranted; wherein the words of the Law are full, for it is not permed in the word of Inheritance: as thus, whosoever usurps upon an Advowson of inheritance of an Infant, or a man of full age, in the time of a Guardian or Tenant for life, or the like: Non sine ira prejudicialis &c. so the word of inheritance in this case is equivocal. For, the word hereditas, is indifferent, and hath relation as well ad infra, as ad supra, as well to the time descending, as the time ascending. And therefore an Estate of Fee Simple, that I have purchased, is not improperly called my inheritance, because it may descend and be inherited from me as well as that which I inherit from another, and descends to me as Littleton hath it, and so; this reason, so, 3.

And

And so the writ is of the wives purchase in her cui in vita quod clamat esse  
jus & hereditatem suam; but the Statute is penned in the word hares or heredes,  
which is single and cannot be strained, but so that he hath an heire. And there-  
fore in the preamble it puts two cases.

First, heredes infra aetatem existentes per fraudem & negligentiam Custodi-  
um.

The second, heredes etiam, five Majores; five Minores per negligentiam vel  
fraudem of Tenant by Curtesie, Dowry, Life, Years, or Tale more many  
times disinherited, or at least put to their Writ of Right, and in case, were as-  
together disinherited.

Then follows the Purview, which two branches answer the two branches of  
the Preamble, Statutum est quod hujusmodi presentationes non sint hujusmodi rectis  
heredibus (supple infra aetatem & in custodia existentibus.) Aut illis (supple here-  
dibus five majoribus five minoribus) ad quos post mortem aliquorum (supple vel  
terminu annorum, &c.) hujusmodi advocaciones reverti debent ita prejudiciales quin  
quocumque aliquis jus non habens tempore hujusmodi custodiarum presentaverit;  
(there is your first branch carried through.)

Then follows the second branch carried through, vel tempore of the Tenant  
in Dowry, Curtesie, Life, Years, or Tale, in proxim. vocationem, postquam  
heredes ad aetatem pervenerit.

There is the first clause answered again, vel advocatio post mortem tenenti-  
um in forma praed' ad hered' plena aetatis revertetur, habeat scil. id' hares eandem  
Actionem & recuperationem per breve Possessorium qualem haberet ultimus  
antecessor hujusmodi heredis.

So you have hares throughout all places and cases of the Preamble, and in the  
purview laid together. And the strength of the Proviso is, habeat eandem Actio-  
nem, &c. qualem haberet ultimus antecessor hujusmodi heredis &c.

These are the verba remedialia vel operativa, the rest make the cases, these  
give the remedy, and are bounded within the two words Heires whose  
Antecessors had right to the abbatson. Also no remedy is given by this Statute  
but for heires, as appears, 1 E. 2. Fitz. Qu. Imp. 43. An Abbot defendant plea-  
ed the last presentment by himselfe, and the plaintife would avoid it being a  
woman, because she was then covert, and also within age; It was answered  
that she was not remedied by the Statute; because she was not an heire but a  
purchaser, whereupon the Court gave judgement against her, because the  
Statute provided but for the heire. And so the case 35 H. 6. 60. doth also agree,  
and F. N. B. Assise of Warrain presentment 31. expresse. And Boswells case is  
full. But 2 E. 3. 11. it is made a question whether heire of a purchaser be  
within the Law and so left. And the Statute, (besides the Letter which is so  
expresse and constant for the heire by name) might very well be led by the reason  
of the Common Law, which gives age to an infant heire, not so to a purchaser,  
though he be as unable to defend his title as the other. And the reason of the pre-  
ferment is because the heire is in by act in Law, (and the Law will make good and  
perfect its own acts) and the other is in by his owne act, which is left to his owne  
strength, and can challenge no more but right, and no favour, as trusting to it  
selfe.

It is nevertheless true, that there is another particular Purview made for  
the Relief of women covert by the word hereditas, and not hares, thus, Hoc  
idem observetur de presentationibus factis ad Ecclesias de hereditate Uxoris in  
tempore quo fuerunt sub potestate Virorum suorum, quibus per istud Statutum  
subveniat per remedium supradictum.

But because the word (hereditas) is indifferent, and the former Purview is  
made the Rule and President of this (for there is no expresse forme speciall  
given for them) but hoc idem observetur, &c. And per remedium supradictum, and  
there is no cause to respect the wife purchaser, more then an heire within age  
purchaser, therefore this clause is to be understood of wives that are heires as  
well as the other.

And



And if it be objected that the Statute speaks of some that were utterly disinherited by such usurpations, which cannot be but in case of a purchaser, for else a Writ would lie.

I answer, that if a man before this Statute had purchased an Advowson, and before presentation had made a Lease and an usurpation had been upon the Lessee, the heir had been without remedy, but now by this Statute he may have a Quare Imped. at the next Avoidance after the Lease, and may lay the last presentation in his fathers Gnant. According to the words of the Statute *Actionem qualem antecessor, &c.* For by the Statute the usurpations upon the Lessee are to be passed and counted as none to this purpose.

Now though I hold this Stat. to the Letter in this case of heir, because the Statute is so constant in it, and the received exposition hath been so, yet I allow divers equities where the reason is the same with the word.

And therefore, for equities I allow, that successors are relieved by this Stat. as well as heirs, but with this distinction, successors of single Corporations, as Bishop, Deane, Prior or the like, and so in Brooke Presentation 46 and Bowwells case, and 34 H. 6, 27.

But of complete and compounded Corporations, I hold it contrary, for the same body continues that committed the Laches, which is the reason of the like difference taken in Crose and Howels case Plowden, in case of non-clayme upon fines.

Again an heir within age, I hold relievable as well that is not in ward, as in ward, and though the usurpation be upon himselfe, the advowson being in his own hands and not in Lease.

Again, if an Infant heir suffer an usurpation, and then another avoidance fall in his Sonage: I hold that he may have his Quare Imped. for that second, though the words be *postquam hares ad aetatem pervenerit*, for, that clause was put in to answer the particular case of an heir in ward, put in the preamble where the Guardian had suffered the usurpation. In which case the Statute saith that the ward could have no title till his full age. For I hold it clear, that if a Guardian suffer an usurpation, and then will surrender to his ward, that the ward shall not be relieved at any other turne during his Sonage, because he shall be counted in by the Guardian to this purpose. But if a Guardian in socage or his ward, after 14 yeares of age, suffer an usurpation, he shall be within the reliefe at any other turne before 11.

And therefore, I deny the opinion of Thorpe, 16 E. 3. Fitzh. Quare Imped. 67 and Brooke 262. For it was the meaning of this Law, to succour the weakness of an heir within age, when he maketh a fault, but not to inloze him to suffer a wrong.

It is true that in such case he cannot have a *Dum fuit infra aetatem*, (for the incongruity of the writ) yet in that case he may enter. But in the Quare Imped. there will be no incongruity.

Again, I am of opinion that if an usurpation be had upon one in ventre sa mere, that at the next turne after his birth, he shall be relieved, contrary to the issue taken, 11 E. 3. Fitzh. Quare Imped. 158. For suppose the heir then in esse, being a daughter, were relievable in respect of her Sonage, were it reasonable that the sonne after doyme (to whom the wrong is now done) should lose that reliefe. Besides this, the speciall Purview of this Statute for Wrelats to be relieved against usurpation in the vacation of their Wrelacies is altogether of the same nature and reason.

Again, a grantee of the next Avoidance is within the equity though he be not a Lessee for yeares, 4 H. 6. A rem. is within the Stat. as a Reversion.

A purchaser may be within the Law, as if one make a Lease for yeares, and the reversion descends to the heir who grants it away to I. S. and then the Lessee suffers an usurpation and the Lease ends: I. S. at the next turne shall have his Quare Imped. for he is in loco haredis, who was relievable, if he had kept the reversion.

An issue in Waple is within the remedy of this Stat. upon an usurpation upon tenant in waple, yet there is no woyd for him but for the reversioner 43. Ed. 3. 20. 34 H. 6. 27. 46. aff. 4.

Now to the second point of the first great point, scil. in what cases the reliefs lies for the heire or successor.

I hold it first clear, that if a man have an Advowson by descent, and being of full age, makes a Lease of it, upon whom an usurpation is made, and then the Lease ends; the heire at the next avoidance shall not have a quare Imped. for by making the Lease by himself, he is party to the negligence and wrong, And the woyd (heires) throughout the law imports, that he should be in as heire of the reversion wronged by the Gardian and other tenants, which he could not help.

And the last clause is more plain, which gives such action as the Ancestors should have had before the demise, so the demise must not be made by him that is to be relieved, but by his Ancestors. Yet 33 H. 6. 12. & 34 H. 6. 27. admit the contrary in pleading, but Fitzh. Natura Brevium 31. C. G. agrees with my opinion. And though in the new Entries, Quare impedit. 20. 7 Eliz. the Queen made title to the Church of Ashton, and declared of an usurpation upon the Bishop of C. which was surrendered to King H. 8. and now the Church voided again, the Defendant pleaded a good grant of the Advowson and traversed the usurpation, and is left that I accept no authority; for the Defendant, having a clear title by the Grant to avoid the pretended usurpation, had no reason to admit it an usurpation as he must have done if he had demurred. But no man will hold that if a Bishop in possession of his Advowson, suffer an usurpation, that his successor shall have a Quare impedit. at the next avoidance: And therefore 7 E. 3. Fitz. Quare impedit. 21. A Bishop Defendant avoided a presentment, because it was made in time of Vacacion; but the other replied that it was in the time of his Predecessor, when the Church was full, which was holden sufficient to put the Bishop's suit out, from his possession action or defence to a writ of right. And the reason is plain, That when a Bishop or a private person suffers an usurpation, he himself is put to a writ of right, and then the succession or descent cannot change it to a Quare impedit. for the usurpation had wrought his full effect, as at the Common-Law out of the relief of the Stat. so as the case could never fall within the remedy of the Stat. after.

And in the great case 35 H. 6. 62. Dandy and Prisor agree, that if one usurp upon an Infant that is an heire, and the Infant come to age within six moneths, and remove not the incumbent by suite, he is out of the Stat.

Now to the third point of the first great point, How the Stat. works the remedy, it is not by making the usurpation void, and so leaving the possession with the right; but by giving a possession action to recover the Advowson, which at the Common-Law was not recoverable but by writ of right. And therefore the verba remedialia & operativa, are habeat eandem Actionem & recuperationem, per bre. possessionem, &c. non eandem possessionem qualem, &c. And it is clear, that if the usurpation be upon a lessee, though the reversion be in an heire, yet the lessee himselfe is without remedy for ever.

Now the usurper cannot gain a Fee in the Advowson during the Term, but it must be the whole Fee, which cannot returne to the heire upon the expiration of the Term, without an Act amounting to an oblivion: and therefore 16 E. 3. F. N. b. r. and Boswells Case do all agree: That the Infant in such case cannot grant an Advowson, because he hath but a right, and in this point the Statute hath made no change, but hath left the possession with the usurper, but hath given the usurper a readier action, and 6 months time more than he had. And therefore I am of opinion that if a man usurp upon me, and his Clerk be instituted, he hath gained the advowson, though the Clerk die within 6 months, but if he die so, I may have a Quare impedit. or present the next time, because the plenary doth not bar my action, till the 6 months incurred by reason of the Stat. But if a man usurp upon the King, the Kings presentation is not taken away till Induction and also after Induction, the King may have his Quare impedit. as long as the usurper or Incumbent

3. Point of the first great point.

cumbent lives, but he cannot remove him without writs, but at the next avoidance the King may present again: For though he may be dispossessed of his present Presentation, he cannot be so of his Advowson, and therefore he may still grant it, notwithstanding the usurpation, as was judged in a writ of error, upon a judgement given to the contrary, between the King and Champion for the Advowson of Newton Valence.

But a Collation be it by right or wrong, gaires no Patronage, as is Greens Case, and Boswell. C. l. 6. 29. 50.

Now though the Statute doth but give the possession, yet I hold clearly, that by the intent of the Statute and by the consequence it gives liberty to present also upon an avoidance: For the Tenor of the Quare impedit, which is given quod permittat ipsum presentare, so the meaning of this Law was to give him a possession or presentation in nature of a Reentry, like the two Statutes of 32 H. 8. giving the wife an Entry upon the husbands discontinuance, and the Dissolutor an Entry upon the dissolutor's heirs.

Now as the rightfull Patron may present, so I hold clearly that the Ordinary must in this Case, as in all others, leave himself, that is, to do nothing but as Ordinary.

If the Church be litigious between the usurper and the other to whom his Jure patronatus, but if he will chuse the Clerk of either at his peril, he must at his peril receive him that hath right by this Statute.

And it is no defence to say, that the usurper presented last, for this is no proof or colour, that he hath right now: And the Ordinary that is to be indifferent, and for whose safety the Law hath provided the jure patronatus, must not preiudge rights, but at his peril.

Out of this discourse the conclusion is, That if the usurpation upon Higden the grantee were in the time of the same Abbot, that made the Grant; that then as well that Abbot as his Successor must have been put to their writ of right, notwithstanding this Statute, and by consequence the Statute of Monasteries could not have brought the writ of right to the King nor from the King, to Stanbope.

And this point is found uncertain by the Jury, for the Grant to Higden was 21 H. 8. and the usurpation 25 H. 8. and from the beginning to the ending, there is but one Prior named Henry, and ever after it is followed throughout the whole case, pred' Prior & idem Prior, so the presumption is rather against the Plaintiffs.

It is true, that if a man plead a Grant of a next avoidance from a Prior, he must aver his life, or else he shall be taken for dead, not out of any thing appearing in the Plea, but out of a rule in Law, that every mans Plea shall be taken most strongly against himselfe, because every man is supposed to be partiall to himselfe, and to make the best of his own Case. But in a Writ it is not so, for that is and ought to be indifferent to both parties.

2. Great Point.

But now to the second great Point, take the Case at the best, that the usurpation upon Higden had been in the time of a Prior successor, so that he might have a Quare impedit, at the next avoidance, whether the King shall have this Quare impedit, by the Statute, which gives Advocationes, iura, ingressus, conditiones, &c.

If a dissolutor die without heirs, or be attainted of felony, the Lord of whom this land is holden shall have his right of entry by Eleazar, and so shall the King in a Case of Treason at the Common Law; not so, if the dissolutor had died seized, as is agreed in the case of the Marquess of Winchester, Co. lib. 3. fol. 2. because attainders by Parliament are but limitations of attainders at the Common Law, & shall be of no other force, except the words be so expresse as can admit no doubt; as where it gives uses and conditions. But the word (Rights) is satisfied in the rights of Entry, so the word dissolutor gives but title, and interests no possession.

The King could have no action against the heirs of a dissolutor: first, because he had a lawfull Tenant by Title: secondly, because he could not recover but by action, which could not be fitted to the Lord; and therefore though he might enter upon the dissolutor, yet he could not have an Aſſiſe upon the dissolutor's done

Actions, Rights and Entries, what are given to the King by the Statute of dissolution of Monasteries or Treasons, or to the L. by Eleazar.

to



to his tenant, because he could not say, that he disseised him de libero tenemento. Now the scruple of our case consisteth in this, that it participates of both these Cases, and which shall be predominant, is the Question.

For at the Common-Law there had beene no remedy, but a writ of right, which the King could not have had by the Statute of Monasteries and the Stat. of Westminster. hath changed the action into a Quare impedit hath not otherwise changed the nature or force of the usurpation. And therefore I am of opinion that if an heire releasable by a Quare impedit, upon this Stat. die without heire, the Lord by Escheat, shall not present, nor have a Quare impedit. The like I hold upon the two Stat. 32 H. 8. of c. 18. & 34 where the wife hath entry upon the discontinuance of her husband, or the disseises upon the heire of the disseisor. For, though entry be given in these Cases, yet they are in by Title as they were before. And the Common-Law will not extend it self to irregular entries that are given by speciall Stat. differing from the reasons of the Common-Law.

But I hold nevertheless that the Stat. of Monasteries shall give this presentation to the King, by the name of Jura & ingressus, the Kings presentation being for this Case a kinde of Entry or Claim, and so he may have a Quare impedit. For the Title is proper enough for him, Quod permittat ipsum presentare for the present disturbance done to himselfe. Not like the Case of an Assize of a wrong done before.

And the same I hold upon the said two Statutes, that if a woman have Cause of entry upon the discontinuance of her husband or a disseises upon the heire of the disseisor and then be attainted of Treason, that the King upon the Statute 33. H. 8. of Treason may upon Office seize those lands by force of the words of that Law that gives the King all rights of entry. Of which sort this is, and which hath not the mischiefs that the Sparrowes of Winchester Case speaks of, viz. of Action, and endless variation upon obscure titles. Though it be true that if the wife will take an Action, it must be a Cui in vica at the least, and the disseises an Entree sur disseisin, which the King cannot have. Vide 8. and 16. Eliz. Dyer 252. and 337. A Lease made to a country Priest not well confirmed, the King and his Patentee shall avoid it.

34 Great  
point.

Now to the third and last great point, I am of opinion, that though this right of Advowson and the presentation to it, and action of Quare Impedit. for it, is to be given to the King: yet it is not well conveyed from the King to Stanhop. The reason is, that the usurper hath gained the Advowson in possession, and hath left in the Priest, and so in the King, nothing but a right, though he be within the reule of the Stat. of Westminster, which right cannot be conveyed away by a subject, and therefore must passe by Prerogative, whereof the rule is, That nothing of Prerogative can passe without expresse and determinate words; As is resolved in the case of Wykes. Plowd. And therefore it will not passe by the word (Advowson) for it is no Advowson de facto, nor by the word (hereditament) being a word doubtfull and ambiguous, which shall never be taken against the King, in a strange sense, nor by the generall word of (rights) without a speciall mention and recital of the particular right, which is meant to be granted, as was resolved in Cromers Case, 8 Eliz. cited in Doughties Case, Co. lib. 3. fol. 11. and there affirmed for Law by the whole Court. In which case of Doughties, it is also judged, that the Statute of Treasons, which puts the King in actual possession, doth not remove the possession of the disseisor, but leaves the right in the King till seizure.

Now this Grant of the King hath no speciall Grant of this right, not so much as the word (Jura) in the nature of naked rights: For it is but in two places. The one is Maner. de Shelford cum suis juribus, which is of another nature. The other is Jura, Jurisdictiones, possessiones, &c. which are also of another kinde. Now the Stat. of Monasteries gives to the King amongst other things, Rights, Entries and Conditions; and then enacts that the Kings Patentees shall have all manors, Lands, Entries and Conditions, contained and specified in their Letters Patents, according to their tenor, and purport and actions for any thing therein

therein containd; And that the King shal have the same in actual & real possession, so that he may grant them without office, and then it hath a saving of the possessions and rights of strangers.

So, it is plain according to the Rule of Doughties Case, upon the Statute of Treasons (which is of the same words and effect) that where the Parson or Abbot attainted of Treason was out of possession, and had but an Entrie, that there the King was not to have actual possession of the Land it self, for then it had been in vain to have given him Rights and Entries, and more vain to save the possessions of strangers.

Now if the King have nothing but a naked right, without possession of the Admonition, it is plain that his Grant extends not to it, as hath been said, neither can it be said to be contained, much less specified in the Letters Patents; which words require such specification, as the Law requires in the Kings Grants, and therefore if the King should have granted Abbey lands, with all grunes found as to be found within the same, this would not be the help of this Statute passe grunes Royall; For the tenor, and purport of the Patent doth not import it, no though the Abbot had had them, and the Grant had been of all grunes in as ample manner as the Abbot had them. So if the Kings Grant had more in the habendum then in the premises, this Statute would not carry that.

Lastly, the issue is joyned that the King granted the Admonition, which is not true. For though it be true, that if the King had granted the right of the Entry and Admonition, that the grantee might have had it, yet still the grant must be pleaded, as it is in Law a grant of the right and not of the thing it self.

By these brethren had argued all before, and had concluded for the Plaintiffe, but they held (though not all alike) that reversioners, as well of full age as within age, and as well of their own lease as of the lease of their Ancestors or Predecessors, whose heirs they were, were within the remedy of the Law, and that the Law preferred the possession for the reversioner (though not for the Lessee) and so made a kind of base fee by wrong during the Lease in the usurper, which was Huttons opinion. Things hard and not warranted in my Judgement.

And so Judgement was given for the Plaintiffe.

False Imprison.

Peter Vers. Stafford.

Record or not.

George Peter Attorney brought an Action of false Imprisonment against Sir John Stafford and others, for imprisoning of him at Bristol. The Defendants plead that time out of minde, there hath been a Court of Record holden at Bristol every Monday, &c. before the Mayor, &c. according to the custome and liberties of the said City, and that according to the said Custome, Sir John Stafford levied a Plaint there against the Plaintiffe, whereupon the other Defendants, being Sergeants, were commanded to arrest him, which they did, &c. The Plaintiffe took issue that Sir John Stafford did levy no such plaint against him, &c. and it was found for the Plaintiffe. And it was said in arrest of Judgement, that it ought to have been tried by the Record. But the Court resolved that it was well tried, for the matter of Record was mixt with the matter of fact, that is, whether the Court were kept, and the Plaint levied, according to the custome and liberties of the City, which is a matter of fact triable per pais: Also the levying of a plaint is like the suing out of an Writ, which is not of Record till it be returned in Court.

And so the Plaintiffe had Judgement in this case.

Debt.

Eslington Vers. Bourcher.

Debt against  
divers Defen-  
dants one alone  
wagerth Law.

Eslington against Bourcher, Knight, Turner and others brought an Action of Debt of 1800l. upon an annual computaverunt, and an arreare of 800l. whereof

all

Ple verſ.  
Weſtly.

Bickford verſ.  
Bickford.

Mason verſ.  
Grafton.

249

all the reſt paid. Bourcher was out-lawed, Turner and the reſt appeared by one ſuperſedaas : Turner alone tendered his Law, that he with the reſt did not owe, &c. And the others not out-lawed did plead to the Countrey. And it was objected againſt Turner, that he was not to be admitted to his Law alone becauſe they were all charged as one Defendant, being for a joynit debt, and ſo they muſt anſwer together. But it was anſwered, that this was unreaſonable, for ſo by joyning with me as joynit Defendants, I muſt be ſubject to his Plea, though he would confeſſe the Action. Now though the Defendants ſhall not ſever in Dilatories, yet in Bars they may.

And after divers motions, there were Preſidents produced, one in Tr. 19. Jac. rot. 2226. and another Hill. 13. Jac. Rot. 541. and a third in Hill. 41. Eliz. Rot. 445. where one of the Defendants alone waged his Law, that he and the reſt did not owe, and the reſt nihil dicunt & parcatur iudicium, till the Law made is failed, and after the Law being made, Judgement againſt the Plaintiffs. And ſo in this caſe Turner was received to his Law, and the Plaintiffs Non-ſuit.

Ple Verſ. Weſtly.

Tr. 16 Jac. Rot. 1948.

Information.

Ple did inform againſt Weſtly Jams-holder, for uttering of Beſh. 30 wages for ſolden, Unde petit adviſamentum Cur. & quod forisfaciat 5l. for every offence, unde ipſe petit medietatem. Upon not guilty, it was found againſt the Defendant, and now it was ſaid in arreſt of Judgement, that there was a Statute ſcil. that gives 5 l. for an offence, but then it divides it one third part to the King, another to the Informer, and the third to the poore: Et Curia adviſare. But I am of opinion that the Information is inſufficient, for an Information hath not onely ſomewhat in it of an Indictment to lay down the offence, but hath alſo the nature of an action, for the Party to demand his due as in another action, which is his Office to demand certain, and not the Courts to aſſigne; therefore if he make no demand, or demand that appears not to be due, his Information is inſufficient.

Information muſt conclude with the demand of the Informer.

Bickford Verſ. Bickford.

Tr. 16 Jac. Rot. 843.

Caſe.

Bickford an Adminiſtrator brought an action of Debt againſt Bickford, and after iſſue found for the Plaintiffs, it was ſpake by Chibborn in arreſt, that the action was brought the 2 of Aprill 16. Jac. and the Adminiſtration was ſaid in the Declaration granted the 11. of May after, ſo the Judgement was ſtayed.

Action falſified of the Plaintiffs ſhewing.

Mason Verſ. Grafton.

Tr. 16 Jac. Rot. 1735.

Mason brought an action of the caſe againſt Grafton, for goods unlawfully out of his Inn, and ſound for the Plaintiffs. In arreſt it was excepted that he had not alleged it to be in Communi Hoſpicio. (Quære if both in the Plea and Declaration.) Yet becauſe the Declaration ſaid the cuſtoms for common Innes, and then ſaid that he was Hoſpiratus in hoſpicio, the Plaintiffs had Judgement. For it ſhall bee intended (and it ſo) Domus, non Hoſpicium, if it be not commune.

Action againſt an Hoſteler not laying commune Hoſpicium.



*Trespasse.*

*Amendment de placito deb. for Trespasse.*

*Harris Vers. Ap John.*

**T**respasse by Harris against Ap-John, after Verdict it was found that the Ven. fac: and Habeas corpus, was de placito debiti. And the Court amended it.

*Obligation.*

*Delivered as a Scrole to the party.*

*Holford Vers. Parker.*

**D**ebt per Holford Vers. Parker sur Obligation: The Defendant pleaded that he delivered the writings to the Plaintiff himself, as a scrole upon condition, &c. Et assint nient son fait, and demurred Indgement against the Defendant, with out Arguments.

*Constables Case.*

**A**ction upon the Statute of Huy & Cry per Constable, versus homines inhabitantes in dimidio Hundredi de Waltham Apres Verdict fuit accept, and President there showed of a like Action, Vers. inhabitantes in Hundredo de W. communiter vocat. half hundred of W. And per the Court gave Indgement in this case for the Plaintiff. For the Court may well intend it indeed to be a whole hundred, and so but called half, and it hath indeed an Hundred Court by it self, and otherwise it should have been so pleaded or given in evidence.

*Covenant.*

*Norton Executor of James Hobart against one Molineux and Ford. Hill. 5 Jacob.*

*Administrator during the minority of the Executor of an Executor, how he shall be named.*

**N**orton Executor of James Hobart, brought a writ of Covenant against Molineux and Ford, Administrators of the goods of Thomas Carrell, during the minority of Mary Molineux, Executrix of the said Thomas Carrell, late Executor of Edward Carrell, upon a Covenant of Edward Carrells for payment of an Annuity, Ille non est factum; found for the Plaintiff. It was pleaded in arrest by Towes, that the Defendant should have been named Administrator of the goods of Edward, not administered by Thomas. But the Court being informed by the Prothonotaries, that this was the ancient form; Indgement was given for the Plaintiff, if the children had been Defendants, they should have been named but Executors of the Executor, for the rest follows, but the committing of administration is of both goods, but the presidents rule in the Tilling, &c.

*Debt.*

*Leese Vers. Arrowsmith. Mich. 16 Jac. Rot. 581.*

*Amendment of the imparlance Rol, by the Writ Original.*

**L**ee brought an action of debt against Arrowsmith, for 300 l. and in the imparlance roll, the Count was upon the sale of divers parcels to severall persons, amounting up but 294 l. But after the Count upon the plea roll was right, and upon nihil debet, it was found for the Plaintiff: and although the imparlance roll could not be amended by the after roll, yet because Bayle the Plaintiff Attorney affirmed that his Instructions to the Clerk were right, it was amended by the Court.

*Smith Vers. Pannell. M. 16 Jac. Rot. 716.*

*Courts Ecclesiasticall meddleth not with railing*

**S**mith and other Churchwardens of Ridgewell in Essex, presented to the Arch-Deacon, that one Pannell was a rapler and a solver of discord between Neighbours

hours, whereupon the Arch-Deacon enjoined him purgation: and the Court awarded prohibition, for the Cause belongs to the Rect and not to them, except it were in the Church or the like.

Wats against Conisby.

M. 16 Jac.

Elizabeth Wats wife of Edward Wats, libelled in the Spirituall Court against Jane Conisby Executrix of the Executors of Henry Conisby for a Legacy of 160 l. The Defendant pleads the release of Wats the husband after marriage, and there were two witnesses to the release but both dead, and therefore not allowed, whereupon Prohibition was granted containing this averment that the witnesses were dead, and that she offered to prove by witnesses that it was the hands of the witnesses dead, and that Wats the husband confessed that he subscribed the release.

Court Ecclesiast.

Court Ecclesiast.  
afflicall refuseth  
competent  
proofe in pro-  
hibition.

Luch's Case.

M. 16 Jacob.

John Luch was brought to the bar by Habeas corpus cum causa directed to the Mayor, Aldermen and Sheriffs of London, who certified the cause as followeth. That there hath been a Court of Orphans time out of mind in London, and that the custome hath been, that if any Freeman or Freewoman die, leaving Orphans within age unmarried, that they have had the custody of their bodies and goods, and that the Executors and Administrators have been and ought to exhibit true inventories before them, and if any debt appears due, to become bound to the Chamberlain, to the use of the Orphans in a reasonable summe to make a true accompt upon Oath of them after they be received, and if they refuse, to commit them till they will become bound, and then the said that one Jane Cutler widow, being a Freewoman Fishmonger, died leaving others Orphans, and that this man was Administrator and had exhibited an Inventory of a 1000 l. debt unrecieved, and was required to give bond of 2000 l. ut supra, and refused per quod, &c. And it was alledged for the prisoner that he was already bound in the prerogative Court to make accompt and so he should be twice bound. Also that he was informed that there was no such custome for witnesses of Freeman. But the Court answered that they could not examine the truth of the Custome, but the validity of it, and they held it reasonable enough, if it were true. And if the Ecclesiastical Court would impose a lawful custome this Court might grant a Prohibition.

Orphans.

Custome for  
Executors to  
give bond in  
Court of Or-  
phans, as well  
as in the Ec-  
clesiastical  
Court.

Prohibition to  
Court Ecclesi-  
astical if they  
intrude into  
the Court of  
Orphans.

Scot Vers. Wall.

Tr. 16 Jac. Rot. 3110.

Inter Scot and Wall, the Plaintiff had a Prohibition containing, that where he had 20 Acres of Wheat, and had set out the 10 part of it, that the Defendant pretending that there was a custome of Tithing that the owner should have 45 sheaves and the Parson 5, and so sued for that, where there was no such custome: For the Court said, that the Modus Decimandi must be sued for, to the Ecclesiastical Court, as well as the very Tithes, and if it be allowed between the parties they shall proceed there; but if the Custome be denied it must be tried at the Common-Law, and if it be found for the Custome, then a constitution must goe, otherwise the Prohibition standeth.

Prohibition.

Prohibition  
where the per-  
son demands  
tithes according  
to a Custome.

Austin

## Austin Vers. Kirby.

Tr. 16 Jac. Rot. 1915.

Super sacram.  
omitted.

**A** Vtin against Kirby, False Judgement upon a Judgement in the County Court in Trespass, the Jury say that the Defendant est culp. leaving out super sacramentum suum and reversed.

Debt.

## Spray Vers. Sherrot.

H. 13 Jac. Rot. 794.

New Writ against the heir or executors, as by journeyes amounteth upon reversal of Outlawry.

**S**pray against Sherrot, Debt against an Heir who pleaded, rians per discent Jour de &c. The Plaintiffs pleaded, That heretofore he sued another Writ of Debt against the same Heir, upon the same Bond in this Court, and the Defendant was Outlawed, which Outlawry for the insufficiency of the Proclamation was reversed, and he freshly brought this Writ, and avers that the Defendant had assets the day of the first Writ purchased; whereupon the Defendant demurred. The like hath bene pleaded against the Executor but no Judgement hath been given in these Cases.

Annuity.

## Smith Vers. Boucher.

M. 16. Jac. Rot. 3339.

Annuity out of clear gains, dischargeth the person absolutely.

**S**mith brought a Writ of Annuity against Boucher and others, the Annuity was 40 l. per annum, solvend, extra clara lucra, de les Allom Wikes. The Defendant pleaded that there were no clear gains, and upon the Demurrer the Plaintiffs had Judgement without Argument. For the Grant chargeth the Person, and the rest is idle.

Margaret Parkins Case.

Prohibition.

## Farmer Vers. Shereman.

Dismes demanded of Abbeylands, entailed before the Statute 31 Hen. 8.

**I**nter Farmer & Shereman in Prohibition the Case fell out, that an Abbot being a Priviledge to be discharged of Tythes quamdiu manibus propriis, in the time of E. 4. made a gift in Talle, and 31 H. 8. the Abbey was dissolved. The question was, Whether the Donee or the issue should be discharged. It seemeth clear he shall not be discharged for the Statute dischargeth none, but as the Abbot was discharged at the time of the dissolution, so they must claime the estate and discharge under the Abbot, since the Statute, so it by a common Recovery the reversion had been barred before or after the Statute, but if the land had returned to the Abbot or King, before or after the Statute, the Case had bene otherwise.

Prohibition.

## Napper Vers. Seward.

Mich. 16 Jac. Rot. 72. &amp; 672.

Prohibition Ecclesia. Court admitting a custom of tithing in perpetuum rei memoriam.

**N**apper against Seward a Parson, had a Prohibition against his Parishoners, that libelled in the Spiritual Court to make proofs by witnesses there of divers manner of Tything, in perpetuum rei memoriam. A strange attempt.



**Barrets Case.**

H. 16 Jac.

5. Case.

**A** War. chart. was brought by J. S. against Barrer, and counted upon a Feoffment made by Dedi & concessi ad Denham in Norff. whereas the R. and was laid to be in another Toton, upon demurrer, this grosse fault appeared and was denied to be amended, because it was pleaded without a Bergrants hand.

No amend-  
ment of a Fe-  
offment of land  
false laid.

**Bird Vers. Snell.**

H. 16 Jac. Rot. 1819.

Ejectione,  
&c.

**B**ird brought against Snell a Bill containing both an Ejectione firme, and a trespass of Assault and Battery, and upon not guilty pleaded, Verdict was given for the Plaintiffe, both for the Ejectment and Battery, and entire damages assessed. And the Court advised of the Judgement, because it was without President, but the damages for the Battery could not be released, because they were entire with the Ejectment. Note it seemeth holpen by verdict.

Ejectione firme,  
and trespass of  
Battery both in  
one Writ.

**Thorp Vers. Taylor.**

H. 16 Jac.

Obligation.

**T**horp brought an Action of Debt against Taylour, and counted upon an Obligation made ultimo die Augusti, anno 4. R. upon Oyer of the Bond, it bore Date 10. die Aug. anno 4. the Defendant pleaded non est factum. The Jury found it his deed, and the Plaintiffe had judgement; for the Count was not of the date, but of the making, and the Jury have found the deed.

Count upon  
the Date and  
making of the  
Deed.

**Bradshawe Vers. Walker.**

M. 16 Jac.

Case.

**B**radshaw brought an Action upon the Case against Walker for these words; Thou art a flitching fellow and didst litch from William Parson 100 l. After Verdict for the Plaintiffe Cur. advisare, for the words are of an uncertain sense, and so judgement was pronounced una voce, Mich. 17 Jac. nihil capiat.

Action for  
words flitching  
Fellow.

**Marsh Vers. Sparrey.**

H. 14 Jac. Rot. 1859.

Ejectione,  
&c.

**M**arsh brought an Ejectment against Sparrey, of the demise of Sir George Wrotesley, and the Plaintiffe had Verdict and Judgement. Note it was moved by Hicham that the Bill was Devisit, where it ought to have been Devisit, and it was amended per curiam.

Devisit for De-  
visit.

**Cuppledick Vers. Sir Philip Terwhit.**

Tr. 16 Jac. Rot. 3210.

Quare im-  
ped.

**C**uppledick brought a Quare imped. against Sir Philip Terwhit & alios qu. permittant ipsum presentare ad Ecclesiam de Vlcibi, &c. The Defendant pleaded quod nulla talis habetur Ecclesia vocat. Vlcibi in Com. pred, whereupon issue and after verdict pro Def. it was moved by Harris for the Plaint. that the Ven. fac. was mistaken: for it was de vicineto de Vlcibi, where it should have been de corpore Com. as where the issue is upon no such Toton: But the Court gave Judgement qd. cassetur breve, for though it be denied that there is any such Church; yet the Toton is not denied, and the Count of Ecclesia de Vlcibi is an allegation

Verdict.

Nulla talis ha-  
betur Ecclesia.

allegation that there is a Town called Vlcibi, whereof whether there be a Church the vicar attests properly from the Town, and though I observed the issue did not meet in words: For the Vicar it is Ecclesia de Vlcibi, and the Plea Ecclesia vocat, Vlcibi, yet the effect is the same. And note that though another of the Defendants, Scil. Clerke, has pleaded likewise to the Vicar, no such Bishop of Lincoln as was named, &c. whereupon there was another demurrer, yet the Judge said it was stated against them all, upon the Vicar, and no opinion given the other upon demurrer.

Pie. Verf. Deane.

Mich. 15 Jac.

Information

Stat. 35 Eliz.  
against Inmates  
whether in  
force or no.

**P**Le informed against Deane for turning one house into many dwellings, upon the Stat. 35 Eliz. the Defendant pleaded not guilty, and Verdict for the Plaintiff. And Sergeant Harris in arrest of Judgment said, that this Stat. was expired; For it was enacted to endure for 7 years, & afterwards to the end of the Session of Parliament then next ensuing, so it determined at the end of the Parliament 43 Eliz. Also the penalty by that Act is given one half to the Church-Wardens of the Parish, where the offence is for, the relief of the poor, to be levied by distress, and the other half to the Informer, & Cur. advifare,

Briers Verf. Goddard.

Adm. during the  
minority of an  
Executor gives  
bond and mar-  
rieth.

**I**nter Briers & Goddard; Administratrix durante minore aetate of the daughter Executrix, made divers Obligations unto the Creditors of the Intestate, and after took her Husband. And the Court was of opinion that so much of the goods of the Intestate as amounted unto the value of the debts paid, and undertaken by the wife, the husband might retain as his own.

Quere how the Case shall be if the wife die, for then the husband is no longer chargeable by her Bond. Also the Court was of opinion that this kind of Administration during the minority of an Executrix was not within the Stat. of 21 H.8. to be granted of necessity to the widow of the Testator, because there is no Executrix all the while, otherwise perhaps it were if the Executrix were made from a time to come.

Prohibition.

Hide Verf. Ellis.

H. 16 Jac. Rot. 567.

Prohibition for  
the second hay  
having paid  
Tythe for the  
first.

**P**rohibition for Hide Plaintiffs against Ellis, Farmour of the Rectory of Shinsfield in Com. Berk. who prescribed that all Tenants and Occupiers of the Wendon, had used to cut the grass and to strein it through called Radding, and then to gather it into mowches, and then to put it into grass cocks in equal parts without brand, and then to set out every tenth cock great or small to the Parson in full satisfaction, as well of the first as of the latter making; upon traverse of the Custome, it was found for the Plaintiffs. And exception was taken that the Custome was void, because it contained no more, then every owner ought to doe, and so no recompence for the second making: But the Court gave judgment for the Plaintiffs. For the nature of it is, but the tenth of the revenue of my ground, not of my labour and industry, where it may be divided; as in grass it may, though not in Cyme. And in others places they cut the tenth acre of wood standing, and so of grass: And so here the Jury having found this to be the Custome there, it is well. And the like Judgment was given upon the like Custome in the Kings Bench, P. 2 Jac. Rot. 1921 or 1922. between Hall and Simmonds.

Phillips

Philips vers. } Fetherstone Haugh } Carver vers. } Grimstone vers. } 251  
 Wood. } vers. Topsall. } Haselrig. } Molineux.

Philips Vers. Wood.

Battery.

Mich. 16 Jac. Rot. 2099.

Philips brought a Trespass of assault and battery against Wood, and Wood who pleaded not guilty, and it was found for the Plaintiff. And after verdict it was moved in arrest of Judgement, that the Verdict was against these two Defendants and another, and therefore the Count ought to have been in the singular which it was not. Et curia advisare. But Tr. 17. Judgement was given, but it was taken as no original, and so ayded by the Stat.

H. 16 Jac. Rot.  
1100. Extra.

Fetherstone Haugh Vers. Topsall.

Debt.

Hil. 13 Jac. Rot. 715.

Fetherstone Haugh against Topsall, action of Debt against the Executor. The Verdict was purchased in the County of the City of Yorke, and the Declaration upon the imparlance. Roll was entered, M. 13 Jac. Rot. 3409. And in the next Civit. Eborum, but the Declaration was that the Testator apud Villam Novi Castri super Tinam conc. se teneri, &c. whereupon the Defendant impetried usque Hillar. and the Plaintiff counted again right, conc. teneri apud Civitatem Eborum, and upon issue plenè administravit, Verdict for the Plaintiff, and Judgement, and after the Record removed by Error, and this assigned for Error in the Kings Bench. It was moved in the Common Pleas, that the imparlance Roll might be amended and made agreeable to the Original, but it was denied by the Court.

No amendment of the imparlance Roll, by the Original Writ.

Carver Vers. Haselrig.

H. 13 Jac. Rot. 970.

Carver against Haselrig, Adm. durante minore etate of an Executor, and did not averre that the Executor was still within the age of 17 years. Opinion, That he need not, otherwise it were if the Plaintiff were such an Administrator.

Nonage continuing by whom averred.

Grimstone Vers. Molineux.

Hil. 16 Jac. Rot. 850.

Information

Information by Grimstone against Molineux Knight and his Wife, for the Recusancy of the Wife, upon the Stat. of 23 Eliz. the Defendant prayed Judgement of the Information, and pleaded a Stat. of 31 Eliz. That for that offence amongst others, the action should be brought in the County where the offence was committed, and avers that the Wife was inhabiting in Lancaster at the time, &c. absque hoc &c. in London, whereupon a demurrer.

London per all Lawes suable in their proper Shires, whether Recusancy be one of them.

Note this offence is not in committing, but in omitting, and non sequens.

Armedes's Case.

Star-chamber.

Pasc. 17 Jac.

Sir Henry Yelverton Attorney Generall, informed in the Star-chamber orders against William Armedes and others, for building without bricks, against the Proclamation, though upon old Foundations. And they were all fined to one yeares value of their houses, saving one that was fined more, because he had built two Tenements upon the foundation of one, for that did work as ill an effect as to one of them as if he had built that upon a new Foundation.

Breach of Proclamation against building, punished in Star-chamber.

And it was said, that Proclamations were so far just, as they were made pro bono publico. for, publique utility as against the increas of buildings in London and about it, whereby if they cannot be sed, cleansed or governed, the Countrey is dispeopled, & timber consumed, the City lesse strong & beautiful, and more subject



to fire. And in this the King builds upon old Foundations, for he found the like Proclamations and proceedings upon them in Queene Eliz. time. The offenders were also enjoined to reform their buildings according to the Proclamation

Star-chamber.

Lake Vers. Hatton.

**M**After Secretary Lake exhibited a Bill against one Luke Hatton, containing that Luke Hatton had delivered to Lady Rosse his daughter a writing importing a conference had between the Countesse of Exeter and him, wherein she should determine to give a diam to the Lady Rosse, and to make away the Secretary her Father, and to charge him with a plot against the King, in the time of the late Queen; and that this Writing coming to the Secretaries hand, he required Luke Hatton to confesse the delivery of it. He the said Hatton did deny the delivery of it, and had published and given out, That he the said Secretary himself, or the Lady Rosse, or some other, by their procurement had devised and contrived it themselves. To this Hatton (being the onely Defendant) had answered and denied the writing, devising or delivering it: And denied also, that he had at any time been with the Lady Rosse. Whereupon many witnesses on both sides were examined, and now the cause among the rest, being ready for hearing: It was excepted by Walter the Princes Attorney, that the Bill ought to be cast out of the Court, and his principall reasons were two.

Libell no man should complain of it in the Star-chamber, but the party grieved.

1 First, that the Writing being a Libell, against the Countesse of Exeter, and so being a wrong inseparable to her, no other person could complain of it, having no interest in it: For perhaps the party libelled against, had rather it should die. And cited a Case of one Lambe a Civilian of Northamptonsh. whose Bill upon the like cause was cast out of the Court for that part of the Libell that concerned others.

2 The other exception was that the charge was in the dis-junctive, and so uncertain.

Now to the point of incertainty of the charge; it was agreed by us all; That that point of the charge was well, for it was no other than a report of the words spoken by him, which they must deliver truly as he spake them. And withall if a man should say of threes or foure words, that they or one or two of them had committed Treason, this were a scandall, whereof they all or one of them might complain. But if a man did complain that two persons or one of them had forged a Deed, this Charge is naught, because it is his owne Declaration, which must be certain.

But to the first exception Sir Edward Coke agreed and relied upon Lambes Case, and added further of his own with a great deale of violence, another reason, That the Countesse of Exeters honour and dishonour, was handled and traversed between two strangers, whereunto she was made no party, which might be turned to a practise, that a man might pretend that a base person had scandalized a third Person of quality, and so by that means defame him. But he might have made the Countesse a Defendant with Hatton, or else have joyned her against Hatton.

To which exception it was answered by me and the Chiefe-Justice, that Lambes case was no whit like this: For in that case Lambe had nothing to doe with that Libell, more then any other of the people, whereas in this the Secretary was named for a plot against the King, and more the Libell to found in his hands, and he charged to be the contriver of it, so that now he is engaged not so much to pursue the Libeller, as to quit himself of the Libell, which will cleare to his fingers, if he finde not another Author. And to say that he ought to have made the Countesse Defendant, is against reason and Justice: against reason, because the Bill layes nothing against the Countesse; and against Justice, to enforce him to accuse her of those foule faults contained in the writing, whereof perhaps he holds her innocent, and therefore hath no word in his Bill to charge her: And to make his intention more cleare, he had moved before the King, that

the

the Countesse would have joyned with him in this suite against Lake Hatton, and it was refused.

And where Sir Edward Coke had said, that if it had been true, that the Countesse of Exeter had a purpose to payson, &c. that Hatton might have justified the Writting, I denied it; for a Libell, though the Contents be true, is not to be justified. But to discover it legally to some Magistrate or other that may have Cognissance of the Cause is the right way, but it may be justified in an Action upon the Case.

Libell punished though the Contents be true.

### Breadman and Coales.

**B**readman was bound in a Stat. of 2000 l. to one Coales, who dying intestate, the Administration was committed to his wife who married one Fawne, which Fawne became bound with others to the King in 600 l. and then he and his wife did by Deed enrolled in the Court of Wards assigne this Statute unto the King for payment of the said debt of 600 l. to the King, which was payable at certain dayes after the assignement: and we resolved that this assignement was good, notwithstanding the Statute of 7 Jac. which makes assignments of debts void, other then such as did grow due originally to the Kings debtour bona fide, for the purpose of that Act was, that no debtour of the King should procure another mans debt to be assigned, which was a common practice; but this is Fawnes own debt, though not to his own use, which he may himself release and discharge, and by the same reason may assigne.

C. Wards.

Assignment of a debt to the King good.

### Waddingtons Case.

**T**he words of the Writ of Diem clausit extremum, to the Escheator are Quod per Sacramentum proborum hominum diligenter inquiras & inquisitionem inde distincte & aperte factam nobis in Cancellaria nostra, sub sigillo tuo & sigillis eorum per quos facta fuerit sine dilatione mittas &c. In the conclusion of the Office it is thus: In ejus rei testimonium tam escaetor predicti. quam Jurator predicti. hinc inquisitioni sigilla sua alternatim apposuerunt.

C. Wards.

It was excepted, that alternatim did import interchangeably, and that so it should not be understood that both Escheators and Jurours should seale to one.

Paroll alternation.

But we resolved it was well enough, because it is said tam Escaetor quam Jur. And it may well be true, that all did seale, and then the adding of the word alternatim, which must not be so curiously construed, but may be taken to both parts of the Inquisition, shall not hurt.

### Lake Vers. Hatton.

Star-chamber.  
5. Case.

**S**ir Thomas Lake principal Secretary, brought a bill in Star-chamber against Lake Hatton servant to the C. of Exeter, supposing that he delivered to his daughter the Lady Rosse a writing, purporting that the Countesse of Exeter had a purpose to payson both the Lady Rosse & the Plaintiffe, and some other scandals of the Countesse, and now denied it and said, that they had forged it. After which Cause published and ready for hearing, it was moved by Sergeant Crew, Sir John Walter, and others, that this Bill ought to be rejected, because this being in effect a Libell against the Countesse, no other could complain of it, except perhaps the Kings Attorney, according to the like rule given in this Court, in the case of Doctor Lambe.

This was long and vehemently debated, and at last voted by the Court: And Sir Edward Coke landing, was of opinion, that there was no more of the Bill to

to be heard, but the proofs that Hatton had charged the Plaintiff with the Libel, as being that whereby he was grieved. But I shewed that in this Case Sir Thomas Lake did not complain of the Libel, as on the behalfs of the Countesse for the wrong done to her, but to charge Hatton with the delivery of it, to discharge himselfe, who was otherwise answerable for it, as being found in his hand.

And so after by the Vote of all the Lords, the Bill was retained and first heard according to the priority of exhibiting of it.

Also in these Cases which were three, whereas witnesses were examined on part of the Bill upon Letters and exhibits, which they suffered not to remain in the Office, but tooke them again into their keeping, all those depositions were refused, for where they are deposed, they are part of the deposition, and therefore ought to remain in Court as their Acts, whereas being kept in the private hands of parties, they may be altered and corrupted after the examination, and so not sufficient to ground a Sentence upon.

Duncombe vers. Wingfield.

Tr. 15 Jac. Rot. 988.

Waller Hartf.

This argument  
was Mich. 16  
Jac.

George Melton and Alice his wife were seised of the land in question in fee, in the right of Alice, and levied a Fine with Proclamations 43 of Eliz. of it to the use of their two, and the Heires of their two bodies begotten, the rem. to Susan Andrews, the lessor for life, the rem. to Francis Duncombe in tail, the rem. in fee to the said Alice; and the Jury found the seisin accordingly by the Stat. of uses, and that the Tenements were in the actual possession of George and Alice, and that Melton alone, Menſe Michael. 44 Eliz. levied another Fine with Proclamations of the same Lands, to the use of the same Melton and his wife, in speciall tail as before, the rem. to Melton himselfe in tail, the rem. to the same George Melton and one Evan Melton in fee; and then the Jury found that they were seised by force of this Fine & the Act of uses prout lex, &c.

And then they further finde that the same George Melton and Alice his wife being so seised and in actual possession thereof; Alice died 14. Novem. 44 Eliz. without issue, and that one John Duncombe is her Heire, and that George Melton continued his possession and was seised prout lex, &c. And that he so seised 1. Febr. 45 Eliz. did for money bargain and sell the Tenements unto Curtis and Stephenson, and their Heires, and set down the Indenture in hac verba, wherein it is appointed that there shall be a recovery against them, and that it shall be to the use of Melton and his Heires, but no inrollment is found, neither is it concluded that Curtis and Stephenson were seised by force, of this bargain and sale, not so much as prout lex, &c. But then they proceed and finde that one John Colt and Holland 23. of January 45 Eliz. did prosecute a Writ of Entry in the post, against Curtis and Stephenson, being then Tenants of the Freehold of the same Land, retor. cr. pur. And then set forth the whole common recovery, wherein George Melton was called to warranty with the Execution. And that the same recovery was to the use of George Melton and his Heires, and then they found that George and Evan Melton and John Colt made a Lease for 21. yeares unto one Speed, which Lease came unto Wingfield the Defendant, and then George Melton died. And then Susan Andrews entered upon Wingfield, and made the Lease unto the Plaintiff, Francis Duncombe, upon whom Wingfield reenters. And whether the Reentry of Wingfield be good or no is the question, scil. the utrum, &c.

I divide the Case into 4 Points:

1. Whether the Writ be remitted upon the second Fine to her first Entails or not: And I think she is and her Husband too, as at the Common Law, upon the taking the second Estate in tail, as the Case is found joined to this, as a part of the same. First point, whether that Remitter extends to Susan Andrews,

Andrews,



Andrews, and the other old rem. and I think it is as long as the Remitter

1. And whether the Remitter failed and when, and I think it failed, and but-  
 2. to soon as the wife died, and then the old remainders were turned into rights.  
 3. What though the Remitter consented upon the death of the wife, yet after the  
 4. death of Melton the husband, Susan Andrews had latell entry by the Stat.  
 5. H. 8. and by her entrie did both regain her own estate and the remainders, and  
 6. so he had power to make the Lease to the Plaintiff.  
 7. What there is no recovery at all found in the Case in respect of the repog-  
 8. nance of the Jerdix.

And to the first point, I make it no question but that the husband and wife  
 being Tenants in speciall Lease, with rem. over, the husband discontinued by  
 fine or Feoffment, and then take an estate back again to himselfe and his wife  
 in speciall Lease. What by this (as it was at the Common-Law) the wife was  
 ipso facto remitted, and by necessary consequence the husband also, though it  
 were true that the husband was so far bound by his own Act, that he could not  
 in his own person claim it so, wherein Littleton being plain, and the Law  
 cleare, I so leave it without regard of the Book 21 E. 3. that makes difference  
 where the wife or husband survives, so that Remitter is created at the first.  
 And the Case is the stronger; yet in consideration of the Remitter, according to  
 the judgement of John Sayes Case 41 E. 3. 17. where a Feoffment was made to  
 a husband and wife in speciall Lease, the rem. to A. Then the husband made a  
 Feoffment and took an estate to him and his wife, the rem. to B. the husband  
 died, the wife agreed to the second estate (as in respect of her selfe she might both  
 being made during coverture; yet it was judged that so the benefit of A. in the  
 rem. she could not, much more here the best estate shall be judged in the wife even  
 for her selfe, since she lieth not to cross the judgement of Law, by her own Act. And  
 likewise for the benefit of the rem. as I also hold in the Case of Sir John Shereley;  
 but Hawtories Case M. 2 & 3 Eliz. Dyer, 192. and 18 Eliz. Dyer, husband and wife  
 leased in Lease remainder in Fee to the husband, he made a Feoffment to the  
 use of himselfe and his wife for life the rem. to her younger sonne and his, the wife  
 might chuse the latter (though she did chuse the first) so then the rem. could not  
 be remitted.

But now it is objected that the Case differs from that it was at the Com-  
 mon-Law for three speciall reasons.

The first, that the second estate to the wife in this Case in question grew by  
 a lease declared to the husband and wife in Lease, upon a fine by the husband  
 and wife, which estate coming in place of the use, must by force of the statute  
 of uses, be such in quantity and quality, as the use was which was out of a new  
 estate and not out of the old, whereinto the remitter should be.

The second Objection is, that the first estate being to the husband and wife  
 in speciall Lease, so that I think incontestable must claim as Joints to the husband  
 as well as to the wife, his fine hath utterly barred those Joints and himselfe, and  
 hath extinct the estate, and so consequently that estate cannot be remitted.

As to the first Objection, I confess it is illud that if an Infant or a woman,  
 having right of lands discontinued, wherein entry was not lawful, if the same  
 Infant or woman comes to that land by way of an use raised out of that  
 estate, the first taker of such estate shall not be remitted, for the violence of the  
 letter of the Stat. 27 H. 8. And the first taker in this Case is to be understood  
 of the first taker of every severall estate, as well in remainder as in possession.

And therefore, 34 H. 8. Dyer 54. Amy Townescotes Case, Remitter in Lease,  
 made a Feoffment in Fee to the use of his wife for life, the remainder to his  
 next Heire of that Intail, he shall not be remitted, no not if he had the use by de-  
 scent, as Simons Case, and Marmadukes Case, 6 E. 6. if he took the first to whom  
 the possession was first transferred by the Statute for then still he shall with-  
 in the Letter of the Law, that hee must be in of the estate, as he was  
 of the use, and yet he hath both the Free-hold and the right and that without his  
 fault,

fault; and can have no Action, which are Littletons grounds and reasons of Remitters.

Note, an Act of Parliament hath every mans consent as well to come as pass, sent, and so he is here an Author of his own hurt; and also he must hold it as the Act gives it, having power to binde every mans right, either finally or sub modo, as here it is for the first Taker. And therefore are sayings for Strangers rights in Acts of Parliament.

See M. 15. & 16 Eliz. Dyer, 329. & 251. Dyer, which is a stranger Case. Cestuy que en taille, remainder to a stranger in Taille, remainder to himself in Fee made a Feoffment before the Statute 27 H. 8. to the use of himself for life, the remainder to his eldest sonne Heire of his first entaile and his wife for life and died: Now the sonne was in by the Statute of the new estate. Resolved by some Judges in the Chancery, that the old Feoffees could not enter to revive to the sonne the first use of intaile; whereof one reason was given that the sonne could not enter against his owne Act, and against the Statute, have any other estate, no not though it were by the Act of another, scil. the Feoffees, and after the Statute had had his working, yet the next Heire of the entaile should be remitted.

But the first taker of a Remainder may be remedied by accident, that is, if a Remitter happen to another before the Land come to him. As if A. be Tenant in Taille the Remainder to B. in taille, and A. make a Feoffment to the use of himself in Taille, the remainder to B. in Taille again. And then the Statute executes these uses. Now both A. and B. have their estates de Novo. But if A. die, now his issue shall be remitted; and so by consequence shall B. in remainder be remitted though he were a first Taker.

Note that in Amy Townsends Case, it was objected that there was a saving of Rights in the Statute of Uses, and by consequence of Remitters inhereunto in the Argument there was no Answer made by the adverse Counsel. But Plowden the Reporter notes, that the saving is onely of former rights: but that answer satisfies not, for it saves rights after the Statute, but the saving indeede preferres rights, but to be recovered and remitted as may stand with the Stat. not against it. But I answer to this, that the Stat. of 27 H. 8. hath changed the reason of this Case, that hath given the wife entry against her husbands fine; so that now by the use called unto her out of such estate, there is not in of an estate discontinued, but of an estate whereupon after the death of her husband she might have reentered.

Now as upon reentry in such Case where the entry is lawfull she is remitted, so where an estate is conveyed unto her, and is in her, though by the Statute her entry being lawfull, she shall be judged in of her best estate, her Remitter being intratio legitima, though not actualis, and so is Dyer 192.

But then it is again re-objected, that yet at least till there be an actual entry the estate shall be judged in her as the use was, which was out of the new estate, according to the opinion of the Councell that argued against the Remitter in Amy Townsends Case of a Feoffment made by a Wife to the use of the Wife, that the Wife should not be remitted till an actual entry.

To this I answer, that I hold the Law not to be so. To which purpose, see Litt. 157. If a man have right of entry and take estate being of full age, &c. he is presently without entry remitted though he took the estate by contrary conveyance, but he saves that if he take but a Lease for years, that doth not remit him but upon his actual entry.

And yet I answer further as cleare that the Jury finde first this second fine to the issue of the husband and wife in speciall Taille. And that by force thereof and of the Stat. of Uses they were seised accordingly. But then they proceeded further, and say, that they were both in actual possession of the Land. Now the actual possession which imports entry of the husband, must be according to the estate, which is entire and indivisible with his wife, which is the reason also of the entire remitter to the husband as well as to the wife at the Common-Law.

So then it appears plainly by the Verdict that there was actuall entry by, and for the wife, which makes an end of that Objection.

As to the second Objection it is also true, that by the Fine of the Husband alone, the entail to the Issues is finally and totally barred: And so are the Cases 18 Eliz. Dyer 351. & 269. and Beaum. Case, And so also and upon the same reason is 16 Eliz. Dyer, 332. Attainder of Treason of the Father forfeits the Lands against the Issues, which are grounded upon the force of the Letter and meaning of the Stat. 4 H. 7. & 32 H. 8. and the Stat. of Treasons, 26 H. 8.

But yet I answer, that the entail, which is barred to the Issues, yet remains, notwithstanding this Fine to the wife in right, as to her self, and to all estates and remainders depending upon it, and to all the consequences of benefit to her self and to others by her as long as she lives as amply and beneficially, as if the Fine had not been levied.

And therefore first take Beaumonds Case. Co. l. 9. 140. which was that John Beaumont and his wife being seised in speciall Taille, remainder to John Beaumont in Fee, he alone levied a Fine to E. 6. in Fee, which Estate came to the Earle of Huntington in Fee. Beaumont having Issue died, his wife entered, the Earle of Huntington confirmed the estate of the wife habendum to her and the heires of the body of her and her husband: And it was ruled that the Confirmation wrought nothing, because she had as great an Estate before. And also the Issues could not be made inheritable, which were before barred by their Fathers Fine, and the Estate Taille as against them lawfully given to another. And it was further resolved by way of admittance, that if the remainder in Fee had not been to Beaumont himself, but to a stranger, the entry of the wife had rejoyed that remainder to the stranger, and had left nothing in the Cognisee, but a mere possibility, so the hath the Taille not onely for her self but to the benefit and benefit to other Estates growing out of one root with his. And yet during the life of Beaumont the Entail had been barred, and all had been in the Cognisee, and the wife had had nothing but a possibility via versa.

Now it is plain and must be confessed, that the Remitter in this Case is to all purposes as effectually, not onely to the wife, but to the rem. and Estates depending, as was the entry in Beaumonds Case. For Remitter is as an entry in Law the Law changing the estate as an entry, if it could be had. Would.

Now because the Statute of H. 7. and especially 32 H. 8. hath made a more absolute subjection of Entails to Fines with Proclamation then the Common Law did since the Statute of Donis conditionalibus, and that these Stat. and the expost. upon them together with the other Stat. of 11 H. 7. of discontinuance of Forfeitures in Taille, have induced many intricacies, perplexities and appearing contrarieties, let us in some measure clear that learning that we may see a way through it upon all occasions.

It hath been a rule that hath destroyed Perpetuities that an Estate cannot be made to cease for a time, and then to rise again or to cease, as to one person, and have being to another, or to devise a Tenant in Taille by condition or limitation of power of alienation, by Fine or common Recovery; Yet in these points these Stat. have induced all these singularities into Entails. And therefore at this day,

1 First, an Estate Taille may cease for a time, and yet rise again, and may cease to one person, and be in force & esse to another.

2 Secondly, an estate in Taille may be in it self perfect, and may be aliened, and yet cannot descend though there be Issues of the Intail.

3 Thirdly, an Intail may descend and cannot be aliened.

4 Lastly, an Intail may be full, and yet can neither descend, nor be aliened.

Also as to the first, Beaumonds Case is so that the husbands Fine alone binds the Intail, so as during his life all is given away, and there is nothing left but a mere possibility. What if the wife survive, she shall be again upon her reentry Tenant in Taille in State as before, so it is ceased for that time and the Issue barred, but as to the wife if she survive the whole Taille revives & is rejoyed to her.

Stat. 4 H. 7. &  
32 H. 8. What  
confusion they  
have made up-  
on Entails.

To the first,



To the se-  
cond,

For the 2 son Archers Case judged 20 Eliz. in the Common Pleas, that if the Grandfather be Tenant in tail, and the Father devise him and levie a Fine, and then the Grandfather die, and also the Father, that the sonne issue in Tail shall be barred. And the same I hold if the Father had levied this Fine without disclaiming his Grandfather, or if he had died before the Grandfather; for though the sonne should claime as heire in Tail to the Grandfather as last seised by the Intaile, yet he must claime as heire in blood by the Father, and so falls plainly within the words as heire of the person that levied the Fine, and claiming onely by an Intaile made to an Ancestor of him that levied the Fine.

And I hold that if Tenant in Tail have issue 3 sons, and the 2 sonne levy a Fine with Proclamations in the life of his father who dies, this shall not bar the elder brother; But if the elder die without issue in the life of the father, the second shall be barred: And if the elder die without issue after the death of the father, so as the elder had the whole Tail, yet if the second or his issue survive and then dy, it shall bar the younger (for he is plainly within the words) as well as the second that levied the Fine. The words of the Stat. of 3 Hen. 8. are that a Fine levied of lands in any tail Intailed to the Conuise, or any his Ancestors shall be a bar against the person and his heires, claiming onely by force of such Intaile any doubt, &c. So the Fine doth bar heires of the Intaile in many Cases, where the Conuise cannot give the land because he hath it not.

And therefore I watch it with the case upon Westm. 2. de Donis. They to whom the land was given shall have no power to alien, but that it shall remain to the issue. Now see Litt. case f. 160. 38 E. 3. 21. 9 E. 3. 16. &c. That if tenant in tail have issue 3 sons and discontinue, and the middle son release and bind him and his heires to warranty, and the middle son dies and then the father dies; This warranty is collateral to the elder, and lineall to the younger, because by possibility he might have claimed from him of that Intaile, and so within the intent not the Letter of that Law as here it is.

So this Land now cannot descend unto the heires in Archers Case, (to returne to that Case) because the descent is stoppt and strangled; Yet I hold it cleare, that the Grandfather after the Fine levied may himself alien: For, as it were against reason, so the Statute hath no Letter to bar his Ancestors, but his heires onely that levied the Fine, so no saving is needfull.

And therefore in Archers Case, if after the fine levied by the father, the Grandfather had made a feoffment to a stranger, yea or but a bargain and sale in fee, and had died, this bargaineer should have both holden the land against the issue in Tail: (For they are barred, and their right extinct by the fine, and so the Stat. of West. 2. set loose not to the reversion) and against the fathers Conuise; For the fine in this Case doth but extinguish the tail, but cannot give it by his conveyance that had not so much as right or a possibility, though there were a possibility, so the Stat. leaves the form and effect of the fine (as to all purposes and persons, but the issue in tail) to the ordinary rules of Law, whereof one is, That a conveyance to one by him that hath but a naked right or possibility workes by the extinguishing of it in the possession, &c. Moyle Finches Case, Co. lib. 6. 70. So if the fathers Conuise will claime the other shall say partes finis nihil, &c. If the issue in tail will claime, he shall plead the fine with a Que estat. though it be false which the other shall not deny, but must answer the fine and partes finis nihil, &c: is no Plea for an issue in tail, for he is a party.

To the third

As to the third Case the Stat. of 1 Hen. 7. makes it as to Sir George Brownes Case, Co. lib. 3. f. 50. Bridges and his wife tenants in spec. taile of the provision of the husband within the Statute 11 H. 7. rem. to Bridges in fee had issue Anthony Bridges, and died, Anthony levies a fine to Browne, and then the mother made a discontinuance, Browne may enter, not by the possibility of his Estate arising out of the Intaile, for he could not have an interest in that, because the whole Intaile was actually without change in the mother) but by the Fee simple. And so also in Wimbish and Talboys Case, so then the tail cannot be alienated by the mother, by reason of the restraint of 1 H. 7. Neither can descend by reason of the fine by the issue in tail in her life.

As to the 4 and last, one may be seised of a perfect estate in tail, yet the same can neither be aliened nor descend, as in the case at the bar, & in Beaumonts case.

It cannot descend to the issue from the mother, though the whole estate tail be in her, because they were barred by the Father's fine before. It cannot be aliened by the Wife, because also it was aliened before by the Husband in alleg. obliuio.

For though it be true, that when the Husband hath levied a fine and dies, and his Wife enters, the Estate is wholly in her; yet that the aliened hath no part of the Estate tail in him, nor any estate derived out of it, but it is wholly voided. So that if there be no issue of the entails, the Husband's consue hath lost the Estate for ever; yet (if there be issue in tail at the death of the Wife) the Estate of the consue shall rise again so soon as the issue by force of the Husband's fine, and that ipso facto without entry, as upon a Cessor of the Wife's estate, like unto Chudleighs Case, of contingent uses arising and falling where there is no disturbance to the possessor.

So when the Wife enters upon the consue, that which was in him as a base fee simple, so long as the Intail lasted, is now in the Wife a perfect Entail again, but to endure only during the life of the Wife, and then to return again to the consue, so long as there shall be issue. So then the Case is, that the Intail remains in the Wife remitted but neither to be aliened nor descend, which are incidents inseparable, but by Act of Parliament; the Deane and Chapter have a Fee simple to receive and go in succession, but not to alien. But now to all other purposes the Entail abides and is in the Wife in the same estate, as it was before.

For first, though the issue be disinherited, so as it is all one to the Case as if there were no issue, yet there is no Tenant puis possibility, or in that degree, as it is resolved in Beaumonts Case.

Also the may make Leases for three lives, under the old Rent, &c. according to the Statute, and it shall neither be forfeiture nor discontinuance, as it is also observed there.

I hold it also clear that in this Case of Remitter, and in the Case of entry of the Wife, as in Beaumonts Case, she shall not only become Tenant in Tail (as I have said) but her entry and remitter shall also reinstate all remainders and reversioners that were depending upon her Estate; that is not otherwise bound, which is also resolved in the argument of Beaumonts Case.

Therefore put the Case that land be specially entailed to A. and his issue, the remainder to B. in Tail, the remainder to C. in Fee, and A. the Husband levies a Fine alone to D. in Fee, and dies leaving issue, the Wife enters, she is in of her estate in Tail and her entry also reinstates B. and C. to their severall remainders, and hath put D. out of his whole estate. And therefore I am of clear opinion, that the Wife in that Case may suffer a common recovery against her self as Tenant in Tail, and touch the common bond, and that shall bar the old remainders of B. and C. for she cannot be said to be eius & autre estate at all, much less to them.

And yet it is a rare Case, that a common Recovery had against the Tenant in Tail, shall bar the remainder and not bar the entails; For here the entails (that is, the issue of the entails) were barred before by the Fine, but yet it may be truly said that the entails be barred by the recovery, because the Wife was seised of the whole estate, which was so barred, and the remainder was then depending immediately upon it.

But what shall be the effect of that recovery after the death of the Wife, against D. to whom the Husband alone levied the Fine, I will speak hereafter.

If the Wife after such common recovery passed against her, dies, leaving issue by her Husband, now D. is to have the land (as hath been said) as if the recovery had against her hurt him, for as to him she was eius & autre estate, and therefore the value cannot come to him. And if she had come as a tenant, yet it could not have hurt D. for his estate and hers never took together, they had dependance the one upon the other. And he had his estate severed from hers

2. Great  
Point.

and by contrary meanes, though both out of the root of the ſentail.

The next queſtion is, taking the Caſe that the Husband and Wiſe were remitted to the firſt eſtate in Tails, and that by conſequence Susan Andrewes and the reſt in remainders were alſo remitted (as I have holden) when the wiſe dies leaving her husband that was bound by his own Fine, what now is become of thoſe remainders.

And upon that I am of clear opinion, that now theſe remainders to Susan Andrewes and Duncombe, that were by the remitter of the wiſe made actual remainders are by her death diſſolved and turned into rights, as they were by the Fine, and ſhould ſtill have been, if the wiſe had not been remitted or reented in the like Caſe, whereof the reaſon is plain.

For the husband by his Fine gave and had power to give the whole eſtate in Tails, as to himſelfe and the iſſues in tail; but he had no power to prejudice the wiſe, ſo ſhe is onely ſaved and the eſtate for her ſake; and ſo much as concerns her and others, that ſhould not claime under the husband, or the iſſues, (if the land had come to them) of which ſort theſe remainders are; ſo that now when ſhe is removed by death or otherwiſe, that eſtate that was preferred for her onely caſteth, and the land returns to the former current, and ſtate that was called by the Fine to the alienes, and ſo by conſequent the remainders which were remitted onely out of neceſſity, becauſe their fundamentall eſtate was remitted, muſt fall together with it, for the old remainder cannot depend and be joyned to the new eſtate which was and is a Fee ſimple. A Remitter cannot be but when the Freehold in poſſeſſion and the right meet, and therefore Littl. fol. 153. puts it that if the husband diſcontinue the wiſes land, and take an eſtate to himſelfe for life, the remainder to his wiſe, he is not remitted till her remainder fall. By the ſame reaſon in this Caſe, the remitter holds no longer, when the poſſeſſion and right part.

And now I ſay (the husband ſurviving the wiſe) the eſtate is ipſo facto adjudged in him according to the eſtate of the new Fine, and not according to the former entail, which he had given away and barred by his Fine. And now it is all one, as if the wiſe in this Caſe had never been remitted or had never entered after the husbands Fine, in which Caſe the remainders could never have been remitted, or as if the land had been given with like remainders to the husband alone in ſpeciall Tails; and ſo the remainders that were before during the remitter in eſſe are now turned into rights of remainders onely. But if on the other ſide the husband in this Caſe had died firſt, and without iſſue, then had the remainders continued remitted becauſe there ſhould have been no interpoſition of the new eſtate between the wiſe and the rem as in this Caſe in queſtion there is.

Out of this diſcourſe appears the difference between this Caſe ſince the Statute, and Littletons Caſe which is the like, before the Stat. Littl. fol. 151. ſaith, that if land be given to the husband and wiſe in ſpeciall Tails, and the husband alien it by Fine, and take an eſtate again to him and his wiſe, that this is a remitter to them both, becauſe they are one perſon, and the eſtate is indiviſible. Now to ſee how far this very Caſe is the ſame in Law ſince the Stat. (as before) and where it differs, and upon what reaſon.

I agree, that in the Caſe in queſtion, the eſtate reſumed to the husband and wiſe, did remit them both as at the Common Law; for the wiſe and her eſtate (as to her) is the ſame that was at the Common Law, no way further prejudiced by her husbands Fine, and therefore ſince ſhe is remitted, her husband muſt alſo be remitted with her and for her, upon Litt. reaſon.

But whereas in Littletons Caſe the remitter was totall to the whole entail, as well for the iſſues as for the parties themſelves, and ſo did wholly aboliſh the whole new eſtate, as tortious and wrongfull: Now the husbands Fine and new eſtate upon it was not utterly aboliſhed, but interrupted onely by the wiſe and for her, and is rightfull and not tortious againſt himſelfe, and his iſſues, as being warranted by a Statute Law. And ſo that the husbands Fine at the Common Law did binde himſelfe as ſtrongly



strongly during his owne life as his Fine. with Proclamations now; and yet he was remitted against it, by reason of his wives remitter which was to the whole estate in Tails to all purposes, and so he is now remittable for his wife, and with her against his Fine with Proclamations, so far as her remitter extends since the Stat. and no further.

And therefore I am of opinion that if upon such a gift a remission were entered, that the husband should not keep a Fine with Proclamations to bar his Issues; that this condition were void, and yet the like condition had been good at the Common Law.

The next point is, since the remitter ceaseth by the death of the wife, and that the remainders to Susan Andrewes and the rest are turned into rights, how now they may reliebe themselves after the death of Melton the husband without fine, as it falls out in the Case.

3. Great Point.

As to this point I have declared my opinion before; that after the death of the wife the remitter ceased, and the land returned again into the estate passed by the second Fine, which continued during the life of the husband, and was to continue as long as there was Issue; if there had been any, for still then they in the remainder had no title to demand the land, but now when Melton the husband died without Issue, then came the Remainder to be demandable; and then Susan Andrewes did enter upon Wingfield the Defendant, claiming under the husband, and made the Lease to Duncombe the Plaintiff, which I hold to be lawful. And I hold this entry of Susan Andrewes to be lawful, and that without question; for the words of the Law of 32 H. 8. are clear and certain that no Fine by the husband only of any land, being the Inheritance of Freehold of the wife, shall in any wise make any discontinuance or be prejudiciall to the wife or her heires, or to such as shall have right, by the death of such wife or wives, but that the same wife and her heires and such other, to whom such right shall appertain after her decease shall and may lawfully enter into the same; so the words are clear, not onely to reliebe the wife and her heires, but also other strangers that have right to the land by or after her death. And for that purpose the Stat. puts two Cases, one, where the wife hath an estate of Inheritance either Fee-simple or Fee-tail: the other, where she hath but a Freehold, meaning an estate for life in the land aliened.

Now in both Cases it gives relief by entry to the heires of the wife, which can be but in the Case of Inheritance. And therefore in the Case of Freehold strangers in rem. or reversion must needs be relieved under the other words; and by the same reason upon estates in tail.

And as no man will doubt but that if the wife enter first, it shall benefit those in remainders also, though the Statute should be thought to be made onely for the good of the wives directly, so clearly here the words give entry, that is the first entry as well to others as to the wives and their heires; yet I am of opinion that if the wife being seised in Fee after such alienation of the husband, should die without heire, that the Lord by escheat should not be within the remedy of this Statute, as I held lately in the Case of the Lord Stanhops Quare impedit.

Now lastly touching the common recovery mentioned in this verdict, I hold it to be so insufficiently found, as there is no recovery at all. And therefore observe that after the second Fine by Melton the husband alone, Mense Mich. 44 Eliz. it is found that he and his wife were seised in speciall Tails with the new remainder over and in actuall possession, and that 14. Novem. 44 Eliz. the wife died, and that Melton the husband continued his possession, and was seised prout &c. And being so seised 1 Feb. 45 Eliz. by Indenture for money do bargain and sell the Land unto Curtis and Stephenson and their heires, and there set down the Indenture in hec verba: To have and to hold to them and their heires with a Covenant in the Deed, that a Recovery should be had against them to the use of George Melton and his heires, but make no conclusion, That Curtis and Stephenson were seised by force of that, not so much as prout lex. But then they finde that one Coll and Holland 23. Jan. 45 Eliz. did sue a Writ of Entry, &c. against Curtis and

4. Great Point.

Stephenfon then Tenants of the Freehold of the premises ret. oct. pur. and thereupon a recovery past with the voucher of George Melton, and that the Defendants returned Execution and that by force thereof, Colt and Holland were seized prout lex postulat. So that first it was found that Melton was seized in possession in Little generall, and so continued till 1 Feb. 45 Eliz. and then granted, bargained and sold the land, which by the word of Grant will not pass without bargain, neither doth it imply liberty as the word Feoffment would, and of the bargain and sale there is no Involvement found, neither doth the Jury find that they were seized by force of this conveyance.

Curtis cannot be taken to be Tenant to the Recovery, for either it must be by the speciall conveyance mentioned, or by the implication tunc tenentem. By the speciall conveyance it cannot be, because the Involvement is not found; like unto Sir George Browne's Case, where it was found that Anthony Bridges labled a fine where it was taken to be without Proclamations, though it were otherwise in common intent and practice; for otherwise the Jury must find in this Case, that Melton did bargain and sell, but that the Deed was not enrolled, and so in the other Case that the fine was without Proclamations, which were against facts, to enforce a Jury to find a negative of that that is not presumed except it be found.

Also note no touch in the Verdict that Curtis was seized by force of the bargain and sale, no not so much as prout Lex, &c.

Now for the tunc tenentem (besides that the Court shall not intend when they found a speciall means of Tenancy that he was Tenant by another means, especially by a disseisin) as this Verdict is found it cannot be, or at least it cannot be effectual.

The Writ of entry was brought 23 Jan. 45 Eliz. against Curtis, tunc tenent, Ret. cra. pur. which is as 3 Feb.

Now it is true that if he were Tenant either at the time of the Writ purchased, or at the return upon the recovery passed, it had been sufficient, but by the Verdict it is plain that he could not be Tenant at the day of the Writ purchased, for Melton continued his possession till 1 Feb. and if Curtis should be taken to have disseised Melton, yet since Melton is found seized 1 Febr. there must be a re-entry, and so the Tenancy lawfully dissolved before the recovery passed.

Now where it is found that Curtis and Stephenfon were Tenants of the Freehold, at the time of the Writ of Entry purchased that appears to the Court false, for that was before the bargain and sale, till which time Melton is found to be seized, and no other conveyance found unto them, but by the bargain and sale.

I grant that a Verdict may be taken by a reasonable intendment, as in Fulwoods Case, though the words be imperfect. But that must be where that intendment stands upright and nothing in the Verdict to impugn it, as there is in this Case expressly; For there is plain falsity and repugnance in this Verdict, one part saying that Melton continued Tenant till 1 Febr. the other part saying that Curtis was Tenant 23 Jan. or else by confessing and avowing that he was Tenant. 23 Jan. by disseisin and that Melton counterd and was seized 1 Feb. For the recovery was not finished till Cra. pur. which is 3 Feb.

Also I agree that where a speciall Verdict contains their doubt upon some speciall point, that the Court shall doubt of no more, but allow all other points, though there be some defects in Goodales Case, Co. lib. 7. fol. 96. where the Jury made this doubt, whether the payment of one hundred pounds, with agreement to have some part of it again, were sufficient upon a condition to defend the estate of a stranger. The Court regarded not that there was no title found for the party that made the Entry, whereupon the Action was brought.

But here the Jury doth conclude upon the generall, whether the Defendants Entry were lawful or no, which is all one as if they had referred to the Court their utrum, whether the Defendant were guilty or not, which depends upon all parts of the Verdict indifferently that may prove him guilty or not guilty.

And

And it is a dangerous thing to contrive a *Ward* larger, or otherwise then upon a safe ground, for it subjects them to an assault, as in this Case to make them to And as it were a perfect Recovery and a perfect Tenant, which without question they meant not generally and at large but only by this bargain and sale, and by no other means.

So upon the whole matter, I was of opinion that Judgement was to be given for the Plaintiffs, and so were the rest of the Judges that had spoken before me; And so Judgement was given.

But they having argued before me, did take the Recovery to be well enough found upon the word *Tunc* tenant, not well observing all the parts, as I noted before.

And then they held that yet the recovery was void, because Melton was by the Remitter (after the death of the wife without Issue) but Tenant in tail puis possibility, and so within the Stat. of 14 Eliz. of assigned recoveries against Tenants for life vouchers.

But taking the Case as I have argued it, and as I hold the Law cleare, Melton was never lesse then Tenant in Tail: First, by the Fine of his wife and himselfe, and then by his own Fine to the use of himselfe and his wife again in the speciall Tails the remainder to himselfe in generall Tail, which remitted him and his wife to the old Tails speciall; with the old remainders depending upon it as long as the wife lived: But when the wife died, then the old Tails and Remainders vanished, and the husband Melton became Tenant in Tail generall by his latter Remainder raised by his own Fine, and so being ever Tenant in Tail, can by no means be drawn within the Statute of 32 H.8. & 14 Eliz. and then if the Recovery were good, he comes in as Voucher of all his Titles in Tail, and binds all Remainders upon any of the Estates, which hee had at any time.

But of this point I spoke not publicly, because I held it no recovery as it was found: But Justice Hutton observing my course, did aske me in private what I thought of the Case, admitting the Recovery to be good. To whom I said as before, that then I held against the Plaintiffs.

Waterhouse & Uxor Vers. Saltmarsh

Pasch. 17 Jac.

"**S**ir Edward Waterhouse and his wife, were Plaintiffs in the Starre Chamber against Saltmarsh, under Sheriffe of Yorkshire, and others his Bailiffs was against J. Keeling. The Case, and thus, The Plaintiff and Keeling were bound with David Waterhouse as his sureties, to one Coale, in 400 l. for the payment of 200 l. whereupon Judgement was given against Keeling, but at the suite of Keeling, Execution was forborne by Coale, to see if any contribution could be gotten of the Plaintiffs, for David Waterhouse was bankrupt, but at the last nothing coming, Coale tooks of Keeling 270 l. in satisfaction of his debt, yet delivered his Bond into the hand of Keeling, allowing him to sue it against the Plaintiffs. Against whom Keeling sent to Saltmarsh a Laticat, and withall a Cap. utlegat. before Judgement at the suite of one Basil a Stranger, without his pivity or the allowance of the Court, or the Kings Attourney, to the end that if the Plaintiffs kept his house, they might break the house, and so forbe both it and the Laticat. The Sheriffe thereupon entered the house in the morning, the outer doore being open, but being within the house with the Bailiffs, some of them being Oxen kids, but the doores and draw their swordes, and presently hee, with two of them with their swordes drawn ran up to the Chamber, where the Plaintiffs and his wife were in bed and the doore lockt, and knocking a little, without telling what they were, or wherefore they came, broke open the doore and took him, and tooks Bond for his appearance upon the Laticat. and 40 s. for finding out a

Riot by breaking an house upon private Proccesse.

"superfied,



"superfed. upon the Outlawry and so discharged him, and afterwards the Plaintiffe paid 100 l. gave assurance to Keeling for 90 l. and had his Bonds both to Coale and the Sheriffe delivered up unto him: Upon all this the Sheriffe was fined 100 l. for the unnecessary outrage and terrour of this Arrest, and for not signifying that he was Sheriffe, that the doores might have been opened without violence, but especially for discharging of the Plaintiffe upon the Capias utlegat. and Keeling, though it were not holden a Star-Chamber Case, that he did use his fellow surety for contribution, in the name and by the consent of the Creditour, though he himself had satisfied in a sort the debt, because it was a just ground of equity, that the sureties should be equally charged, and it is so commonly used in the like Cases, yet he was fined 50 l. for using the Kings Process and Prerogative, without warrant of Court, or party interested, he himself having no interest in it, but by that indirect means defrauding the Plaintiffe of his liberty of defence of house, against his private debt.

Escape.

Casely Verf. Weston.

**E**zechiel Weston late Sheriffe of Radnorshire was fined at the suit of Casely, for that having a Cap. utlegat. after Judgement delivered unto him, against one Bradshaw, being in view when he was attending upon the Judges of Assize; from the Church to the Hall, he did not endeavour presently to take him, whereby he then escaped. But it did also appear that having means afterwards to take him, he did it not, but took his way to save him harmless.

Lancastell Verf. Sidney.

Error for want  
of Baile in the  
Kings Bench,  
how it shall be  
assigned for  
Error.

**S**tephen Lancastell Executor of Rich. Lancastell recovered in the Kings Bench, against Sir Ralph Sidney 100 l. debt, who being taken in Execution escaped, and Stephen Lancastell brought an Action of debt against Sir George Reinolds the Marshall in the debt, & detinet and had Judgement; whereupon a Writ of Error brought, and George Crook insisted upon Hicoks Case cited in Hargraves Case, Co. lib. 5. 31. Judgement was given in the Kings Bench, and Errors were assigned, that there were neither Baile nor Bill filed there. We agreed that the Error must be assigned, that there was neither Baile, nor the party in the custody of the Marshall, for if hee be, I may declare against him, for that is naturall, all Declarations being Custodia, &c. and the Baile is but a fiction of the Marshalls custody, and so known to the Courts, for otherwise it were against the Record to aver that he were not in custody being so laid and answered to.

Case.

Willis Verf. Woodhouse.

Want Bill  
of 5 Baile.

**W**illiam Willis brought an Action upon the Case upon a Trover and conversion of goods, against William Woodhouse in the Kings Bench; the Defendant pleaded not guilty, and the Plaintiffe had a Verdict and Judgement. The Defendant brought a writ of Error and assigned two Errors: The one that there was no Bill filed, the other that there was no Baile. And upon a Certiorari in that Case awarded and returned, it was certified that there was neither Bill nor Baile filed and the judgements notwithstanding the said errors, was affirmed in Camera Scacc. Tr. anno 17. Dom. Regis viz. 5. die Julii in eodem ter. and the Record and the proceedings on the same Writ of Error were remanded eod. Ter. in Banco Reg. qu. vide tr. 16. Rs. rot. 945. in Banco Regis ubi tam prim. judicium quam secundum intratur.

The want of a Bill being the Originall, was taken to bee within the meaning and intent of the Statute of 18 Eliz. cap. 14. and remedied by the Equality of that Stat.

2. The want of the Bills was not material, because it might be that the Defendant was in custodia Mar. at the time of the Plaintiffs Bill exhibited, according as the said Bill supposeth.

*Edwards Vers. Graves.*

Tr. 17 Jac. Rot. 895.

Prohibition

Tr. 7 Jac.

It is no Legacy where Land is appointed to be sold by Executors, and the money to be disposed to certain uses. Courts Ecclesia. cannot hold Plea in equity but merely of Causes according to their Law.

**P**hilip Edwards Executor of Philip Edwards, had a Prohibition against John Graves, and the Case was that one Agnes Salter devised that the Testator and three others should sell certain Lands, and should dispose the money to the Defendant, and three others equally; the Land was sold accordingly, and the now Defendant sued this Executor in Court Christian, for the fourth part of the money. The Court held that neither the land nor money was Testamentary as this Case is, for it was not debts, but a humane arising of Land and appointed to special uses in way of Equity, and not as a Legacy, and therefore is not to be sued for here, but in Court of Equity; neither can that Court hold Plea of a Legacy in Equity, but where it is a Legacy in Law indeed, for they must hold Plea by their Law as our Courts of Law do.

*Twisse Vers. Cotton.*

Replevin.

Dower against a Tenant for life, a Fine of the Reversion how it works upon it.

**T**he Case was, Tenant for life, the Reversion in Fee of Land whereof the Defendant had Little of Dower, and brought a Writ of Dower against the Tenant for life; bringing the Writ he in the Reversion levied a Fine with Proclamation of the Reversion, the Tenant for life died, the five yeares expired, and now the Defendant brings a new Writ of Dower against the Tenant in possession.

*Reynolds Vers. Okeley.*

Replevin.

Distresse of beasts escaped for Rent.

**T**he Defendant owed his Rent collected upon a Lease for life, the Plaintiffs pleased in Bar and entered himself Title to 10 Acres adjoining, and that he put in his Beasts, and they strayed into the place, &c. and he freshly followed to take them out, but before he could recover them, the Defendant distrained them. The Case had been somewhat better, if the Tenant ought to maintain the Fence.

*Sir Christopher Heydon and Goodhall.*

Replevin.

Sureties in a Replevin.

**I**n a Replevin, Goodhall advised for Rent collected upon a Lease for yeares, and had Judgement to have reple. twofold, and damages and costs adjudged. The Plaintiffs brought a Writ of Error, and had a Superfedeas, and it was moved for Goodhall, that Heydon might take his action according to the Statute of 3. of the King. But the Court refused by the meaning of the Statute he was not to have Sureties. But if the Plaintiff had brought an Action of Debt for the Rent, and had Judgement, it had been within the Statute, for the twofold are, &c.

*Chandler Vers. Thompson.*

Obligation.

Execut. for time how hee shall plead when his time is expired,

**C**handler against Thompson Executor of Marlet, debt upon an Obligation of the Testator. The Defendant pleads that the Testator made him Sureties till one John Marlet should come to 21. yeares of Age, and in the meantime time to keep all his goods for him, and then to deliver them unto him. And the said John Marlet then to be Executor, and sheweth that before the Will, John Marlet was 21 yeares of Age, and that he delivered him the goods which he ac-

Executor for a  
time wasteth his  
goods, how the  
creditor shal be  
relieved after  
his time expi-  
red.

cepted, absque hoc, qd. ipse est vel die impetrationis, &c. fait Executor, &c. It was debated by the Court, if the first Executor sold or wasted the goods, how the creditor should relieve himself for those goods, the new Executor taking upon him the Executorship; for the goods never came to the hands of the new Executor, though perhaps he may have an Action against the former Executor, for so much as he did not lawfully Administer; for against the Heidees, he can have no remedy, or else the old Executor may remain an Executor still for that purpose, the other being none in effect for those goods, like the case of a Sheriffe that doth not deliver his prisoner that he hath in Execution to the next Sheriffe.

## Prohibition.

Fawkner Vers. Andrews.

Tr. 17 Jac. Rot. 864.

Dismes charged  
of the Tithes  
of wood in the  
wilde of Suffex.

**I**n Prohibition the parties bes at issue upon a custome de non Decimando of wood, infra Wildam Suffex. It was moved by Finch, whereto the ven. fac. should be, and the Court directed that the best was de corpore com. for wilde is no visne, wherof the Court can take knowledge, unto this Towse for the Defendant assented; these kind of assents would be entred upon Record.

Breve de  
Recto.

Plat and Holford.

**I**n a Writ of right between Plat Demandant, and Holford Tenant, the Tenant pleaded that he was within age, and in by descent, and prayed that the Writ might demur till his full age, wherunto the Demandant replied that he was seised till the Tenant dissaied him, and traversed the descent, and day was given to the Tenant to advise what he would doe.

Waterer and Freeman.

a Fieri fac. up-  
on one Judge-  
ment,

**T**he Case of Waterer and Freeman sup. was this Terme judged for the Plaintiffe, and the rest of the Judges desired me to deliver the Judgement and reason, whereto I first observed that the money was not twice levied, nor the Plaintiffe twice charged with the damages, as the Declaration ran: for the first was, pro defectu emptorum damna parata habere non possum, but yet it appears by the Declaration that he was twice vexed and grieved, and that lawfully by the Defendant who had first one Execution inchoate, which he ought to have followed knowing it, and not to have taken another, for else he might take 20 Executions and take away his milch cattle, or his plough beasts, but now the Jury must give damages according to the losse.

But if the Defendant in this case had not known of the cattle first taken, he had not been liable nor subject to this Action.

But now to the main point, we hold that if a man bring an Action upon a false surmise in a proper Court, he cannot bring an Action against him and charge him with it as a fault directly, and ex diametro, as if the suite it self were a wrongfull Act, for Executio Juris non habet injuriam. And as all by nature is good, so Saint Paul saith the Law is good if a man use it lawfully, so the abuse of Law is the fault. Therefore 11 El. A man brought a Writ of Forgery, of Faux faits, the Defendant though he was found guilty, could not have a scandalum magnatum, and lay the charge contained in the Action to be the scandal, so 43 Ed. 3. 33. The Plaintiffe brought an Action of false imprisonment, the Defendant pleaded that he caused him to be imprisoned upon a Statute. The Plaintiffe replied that there was a day given him upon Defensance to pay the money, and that he paid the money before the day limited, and yet it was ruled against the Plaintiffe, because he was imprisoned by course of Law.

And so we rule it every day, that if a man be imprisoned upon a so;mall suite, though there were no just cause of suite, yet if he give a Bond for his release,



he shall not abold it by a duresse, for it is incarceration legitima, that is by Law, though the Plaintiff did untruly procure it.

But now on the contrary part, if you charge me with a crime in a Court that is no way capable of the Cause, I shall have action for it, and lay that very complaint to bee the slander, as it is resolved, Coke 1.4.14. In the Case of Buckley against Wood, for a charge of Piracy or Felony, in the Star-chamber, for that is scandalous temerarium, as if it were spoken elsewhere, the Star-chamber being as no Court to that purpose. So I hold if a man sue me in the Spirituall Court for a mere Temporal Cause. 8E.4.

Now to the principall Case, if a man sue me in a proper Court, yet if his suit be utterly without ground of Truth, and that certainly known to himself, I may have an Action of the Case against him for the undue vexation and damage that he putteth me unto by his ill practise, though the suite it self be legall, and I cannot complain of it, as it is a suite, as in the Case before; and therefore the 16 of E. 3. Fitz. Decept 35. a Connesor of a Statute sued Execution against his deed of Deceasans, whereupon the Connesor had an Action of Deceit against him and his Assigne in the nature of an audita querela. So note the distinction upon this Case, and 43 E.3. before. If a man sue me, and hanging that suite commence another against me, to this I have a Plea in abatement, which proves this latter suite unjust, and vexatious: but if he discontinue the former, he may bring a new Action. Likewise I hold that I may have an Action upon the Case, against him that sues me against his Release, or after the money duly paid: yea though it be upon a single Obligation. So where one doth bargain and sell his land at the Common Law, and refuseth to make assurance accordingly, and after conveyeth the Land to another, who hath knowledge of the first bargain, the first bargaineer may have an Action upon the Case of Deceit as well as Subpena, whereupon Fairfax 21 E.4.23. saith well, that if men will bee good Pleadors, there should not be cause of so many suits in Chancery. But now two Cautions are to be observed to maintain Actions in these Cases.

The first, that the new Action must not be brought before the first be determined, because till then it cannot appear that the first was unjust, which is the reason given by the Judges 2 R. 3. and that is the reason that a Writ of conspiracy lies not till the Plaintiff be lawfully acquitted. The other Rule is, that there must bee not onely a thing done amiss, but also a damage either already fallen upon the party, or else inevitable. And therefore 19 H. 6. 44. If a man forge a Bond in my name, I can have no Action upon the Case yet, but if I am sued, I may for the wrong and damage though I may abold it by Plea, but if it were a Recognisance or Fine, I shall have a Deceit presently before Execution. For quæ in continenti, vel certo sunt inesse videntur, 43 E. 3. 10. Deceit against one that procured a Formedon by Collusion.

*Fleetwood Vers. Curley.*

H. 16 Jac. Rot. 1197.

**M**iles Fleetwood Knight, brought an Action upon the Case, against Francis Curley Esquire and declared, That whereas the King by his Letters Patents, An. 7. did make him general receiver of the Court of Wardes during his life, which Office he had justly executed ever since, that the Defendant the 16 of R. Jac. having speech with one Whorewood of the Plaintiffe, did speake of the Plaintiffe these words, *Sp. deceiver* (Innuendo the Plaintiffe) hath deceived and cozened the King and dealt falsely with him, and I have him in question for it, and I doubt not but to prove it ere it be long. Upon issue not guilty it was found for the Plaintiffe before me at Guildhall, in arrest of Judgement it was said, that it doth not appear by the words spoken, that they were spoken of the Plaintiffe, For *Sp. Deceiver* had no propriety to that purpose, and then the

*London waller.*  
Action for  
words, Mr. De-  
ceiver hath de-  
ceived and co-  
zened the King

Innuendo will not make it certain, when it appeareth to the Court, that the words will bear no certainty.

Secondly, it was objected that he did not say that the Plaintiffe did deceive the King in his Office, yet the Court after divers Arguments gave Judgement for the Plaintiffe. And as to the first exception it was agreed that if a man should say, looking upon three persons, one of these three murdered a man, no Innuendo will help this uncertainty, no more in the person then in the matter of the scandall.

P. 13 Jac. Haring brought an Action against Ducking, for saying that he had forged a writing Innuendo a Bill of Debt setting down in the Innuendo all the circumstances; and though he had a Verdict, yet could have no Judgement. But here it is said that at the time of the words the Defendant had speech of the Plaintiffe, and expressly that he spake these words of the Plaintiffe. And then the word Deceiver, though in propriety it doth not import Receiver, yet the allusion and ironical resemblance of the same doth very well bear the Application of the Innuendo, and if such a slight evasion should be admitted, it would be a common practise with crafty wits, to slander safely. And if he had said, *q. Receiver*, there had been no doubt.

And as to the second point, it was likewise agreed that words of an ambiguous sense shall receive the best sense, as (pox) not the French por, and 11 Jac. Miles brought an Action against Jacob, for saying hee had poisoned one Smith, and had Judgement in the Kings Bench, but we reversed it, because it might be against his will: It was also agreed that if the Plaintiffe should have added an Innuendo, that the deceit was in his Office, it would have been nothing available. But the Court resolved that upon the whole Case here the words must be understood of themselves by construction of Acts of his Office, for words ambiguous must also be of indifferent sense that shall be indifferently taken.

But when there is a pregnant, violent and certain sense that may lead the Court and hearers to take it one way, that shall be taken, and not another imagined, whereof there is no appearance. So here when you say of the Kings Receiver, that he deceived the King, it must be understood in that wherein it appeareth that he may deceive him, and not to take it at large when no other meaning appears; And therefore not like the Case of Pox, or poisoning being mentioned, otherwise if he had said, that he had been a common deceiver, without applying it to the King certainly, whose Officer he is. Mic. 11 Jac. Yardly being an Attorney brought an Action against Ellis, and declared whereas he was retained by one Bancroft against the Defendant, he said of him to Bancroft, your Attorney is a blything knave, and hath taken twenty pound of you to cozen me, and had Judgement; For it shall be taken spoken of him as an Attorney. And Mich. 14 Jac. Box an Attorney brought an Action against Barnaby for calling him Champertor, and had Judgement. And it's not materiall that it's not alledged in this Case, and the others, that the hearers did know him to be the Kings Receiver, and the others to be Attorneys, and yet it were not actionable, if it were not so; and the slander and damage consist in the apprehension of the hearers, and therefore slanderous words in Welsh bear no Action, except you affirm that they were spoken in the hearing of them that understood the Welsh Tongue: But when slanderous words are spoken, which are a wrong, the wrong doers are answerable for all evil events and damages. Now the hearers may come to the knowledge of others to whom they shall report the words may know that they are persons of that condition that make the words actionable, which in the Case of Welsh words cannot be so understood in any reasonable possibility.

Crane Vers. Taylor.  
Tr. 14 Jac. Rot. 3491.

Covenant.

John Crane brought an Action of Covenant against James Taylor Doctor of Divinity, and one of the Prebendaries of Ely, and the Case was, that Doctor Tindall Deane of Lincoln, and this Defendant, and all other the Prebendaries there, by their speciall names had covenanted jointly and severally, to make a Lease of an Aune called the Bell within Newgate unto Crane, which Lease and Covenant was by demurrer in Law agreed to be hold, upon the Statute 18 Eliz. but the Case was judged for the Plaintiffe that the Covenant was good in Law, because it was not within the Statute 18 Elizabeth being concerning a house in London; for, though the Stat. 13 Eliz. Cap. 10. be generall against all Leases and grants, other then for thientie one yeares, and then libes of all the possessions of Deanes and Chapters, &c. yet there is a Statute of 14 Eliz. Chap. 11. which is thrust into an Act of continuance of Statutes that enacts that that Statute 13 Eliz. (naming it) shall not extend to appoyntes in Cities or Townes, &c. but that the same may be granted, demised or assured, as they might lawfully have been before, and as if that Stat. had not been made. so that Stat. sets all loose touching such houses in Cities as against the Stat. of 13 Eliz. and therefore that Stat. of 14 Eliz. Cap. 11. makes a new Law of it self for them; that no Lease shall be made of them in Reversion, which was not restrained by the 13 Eliz. as appears by the Stat. of 18 Eliz. which provides for that mischief, as not provided for before. Also the Stat. 14 Eliz. Cap. 11. forbiddeth alienations of such houses except there be full recompence given to the Church at the same time, so as with such recompence they may alien in Fee, which was not permitted by 13. When comes the Stat. of 18 Eliz. which recites that since the making of 13 others Leases were made long before the expiration of the former against the meaning of the Stat. 13. and enacteth that all Leases made of Lands, whereof any former Lease was then in being, and not to be ended within three yeares should be void, and that all Bonds and Covenants for making Leases against the intent of 18 or 13 Eliz. should be void, so this Stat. toucheth not the Stat. of 14 Eliz. which permitted not Leases in reversion at all nor was named, or mentioned in this Stat.

Cambridge,  
Goldsbrough.

Statute 18 El. s  
Church Lease  
and Covenants  
for them ex-  
tend not to  
houses in Cities  
&c.

Wilden Vers. Wilkinfon.  
Pa. 16 Jac. Rot. 2363.

Obligation.

John Wilden brought an Action of debt against John Wilkinfon upon an Obligation of 100 l. the condition was to save the Plaintiffe harmlesse from all Actions and damages that might arise upon the Release of the Defendant out of execution (being then in execution at the Plaintiffes suit) from all persons that might trouble him concerning the said release.

Civit. Eborac  
Goldsbrough.  
Condition of  
an Obligation  
expounded by a  
matter debors.

The Defendant pleads that the Plaintiffe levied a Plaint in the Court of York against one Nuttall for a Debt of an hundred pound, and that he and one Hart became his Baile, that the Plaintiffe had Judgement against Nuttall, and also against the Baile; and this Defendant was thereupon taken in Execution and the Plaintiffe released him, which is the same release in the condition, and so concludes that he did save him harmlesse, &c. The Plaintiffe replies, and confesseth the Plaint, Baile and Judgement ut supra, but saith further that before the Defendant was taken in Execution, Hart the other Baile gave him security for his money, and in consideration thereof, the Plaintiffe promised Hart that he might take out and lay the Execution upon the Defendant, and that he would not release him, without the consent of Hart, whereupon Hart procured him, to be taken in Execution, and then moved the Plaintiffe to discharge him, who, acquainted him with his promise to Hart ut supra, and thereupon the Defendant made him this Bond, with condition prout, & then shewed that thereupon he discharged



charged him: And Hart brought his Action for breach of the promise in the Kings Bench, and recovered a hundred and fifty pound damage, & sic damnificatus, whereupon the Defendant demurred in Law, and Judgement was given for the Plaintiff against the Opinion of Hutton, who thought that the condition was to be understood onely by the words of damage directly growing by the release, and not by any collateral Act dehors, as is this promise. But the reason that moved the Judg. was, that this condition did carry a forcible and apparent intent of saving harmlesse of some damage that might arise, not upon the Release alone, but upon some external and collateral thing besides the Release, and yet by the means and occasion of the Release: For the words are, to save harmlesse, &c. from all persons that might trouble him concerning the said Release: Now, no other person could molest or trouble him for the Release of his own debt onely, wherein no man could have to do but by means dehors; and where it was said the replication was but matter of equity, it is not so, but it was a necessary part in Law to make it appear to the Court, that this breach was within the condition, which was otherwile generall and to be taken as Hutton tooke it, and as the barre is, and the declaring of this promise to the Defendant whereupon he gave the Bond, doth also somewhat help the Case, though I am of opinion it would have served without it, for he takes upon him at his perill to defend him against all damage concerning the Release. Now Harts Action was exactly laid according to the promise, for otherwile there could have been no lawfull damnification.

Starchamber.

### Courteens Case.

**Y**Elverton Attorney generall exhibited a Bill in the Starre-chamber against William Courteen, and seven or eight score Dutchmen, for buying and transporting of sundry great summes of money, since the beginning of the Kings Raigne, and laid his Bill that they had jointly and severally bought and transported great summes in generall, naming no certain summe, that is to say, William Courteen so much certain, and so every one after another his portion certain. Upon this Bill Delew, one of the Defendants demurred in Law, because this offence was made by Law penall, and therefore ought to be tried within the time pressed for penall Lawes.

Again, the Statute gives for this offence forfeiture of body and goods, and so makes it capitall. This demurre was referred to the chief Justice, and to me, over-ruled it.

Transportation of money is an offence against the Common Law.

Statutes that give forfeiture of body extend not to life.

Many severall bills though but in one writing.

To the first the Bill was laid not as an offence against a Statute, but against the State-Policy and safety of the Kingdom, and so punishable and not permitted by the Common-Law.

To the second we resolved clearly that no Statute could be extended to life by doubtful and ambiguous words, and therefore the forfeiture of the body shall be understood the losse of liberty and use of his body by imprisonment.

This Case the Attorney brought to hearing against divers, and served some of them with Proces ad audiendum Judicium, and some not.

Now though the common rule of Starchamber is, that if one Defendant be served to hear Judgement that it serves for all: yet in this Case it was resolved upon debate, that it could not be so. For Presidents of Courts as well as Lawes are built upon Reason and Justice, & tant habent de lege quant habent de Justitia. Now in this case though there is but one writing or Bill against all the Defendants, yet it is as many Bills as Defendants, because they are so many severall parties and offences; for though he did lay the offence, first jointly and severally, yet that is corrected or explained by the severall application of a distinct position to every person, and so the word joint is frustrate, and so there is no reason that the serving of one Defendant should make another answer, that hath nothing to doe with him or his Cause, for it is not the parchment, but the matter that makes one or sundry Bills.

In this suite most of the Defendants had pleaded in Bar not guilty, and afterward in their Resjoynder had pleaded the Pardon by Parliament, 7 Jac. which did extend to buying of money, but not to transporting; whereupon two questions arose:

Pardon general  
pleaded in Re-  
joynder after  
not guilty.

First, whether so many of the Defendants as were neither Naturalized nor Indentized, were capable of the Pardon.

Secondly, whether it were receivable not being pleaded in Bar.

To the first it was urged that the Generall Pardon in the Preamble and in all parts useth the words of loving and obedient Subjects; whereupon the Chief Justice did in a manner expressly hold them out of reliefs. But I did abate that question, as being not necessary, for we all agreed that it did no good in the Resjoynder for these reasons.

Pardon general  
whether it ex-  
tends to aliens.

1 Not guilty, is the proper and perfect generall Issue, and needs no Resjoynder.

2 Secondly, Resjoynder must not merely depart from the Barre, as this doth and more, for it implieth a contradiction, the one innocent, the other pardoned as nocent.

3 Thirdly, upon Answer, which is upon Oath, The Defendant is examined upon Inter. and both make but one Answer: But upon the Resjoynder which is without Oath he is not examined, and yet he pleads matter of Fact that he is none of the parties excepted, and so against the course of the Court he pleads without Oath matter to bar the suite.

But to the other point, I told the Attorney Generall, that I held the Dutch, living here within the Kings Protection, being of a friend Countrey to be also truly under his Subjection; and therefore capable of the Title of his loving and obedient Subjects; but they are not capable of the distinct Title of naturall Subjects, which is usually in Statute set in opposition against Denizens and Strangers. And therefore if such a Stranger in amity commit Treason here, the Indict. shall conclude con. debitam allegiantiam, and shall call the King Dominum suum, but not naturalem Dominum.

And besides the generall Pardon hath respect of retribution for the Subsidy, wherein though the Strangers be no Quaints, yet they pay more then we, and in a sort they may be called Quaints, for by living here they do tacitely submit themselves to our Lawes and forms of Law making, and so their grant and consent is intolved, in the consent of Parliament. And though they be not admitted to the choice of Knights and Burgeses, that moved not, for no more are the English themselves that are not Freeholders. And I thinke no Judge will doubt but that such a Stranger shall have the benefit of such a Pardon against common penall Lawes, and other common offences. But if the Stranger were not in the Kingdome at the time of the pardon made, then hee were not within the benefit, for hee is no otherwise a Subject but by his residence here.

Hollis Case.

Star-cham-  
ber.

The Attorney generall did inform against Sir John Hollis, R. Houghton, for that upon a Petition exhibited against him to the King by Sir Edward Coke, for stirring up one to scandalize and sue him in the Star-chamber; the King referred the Examination of it to some of the Lords of the Council, who having called and examined him, did thereupon enjoin him upon his Allegiance that he should disclose nothing that had passed in his examination, and that yet he had in contempt of that command disclosed some of it to such and such, and named to whom, to instruct and prepare them to suppress the Truth.

To this the R. Houghton demurred in Law and assigned for cause that this command was not binding, because it was not as from the body of the Council, but from particular Committees for one speciall purpose. But the demurrer was over-ruled; first materially in that the preparation of witnesses, to suppress

Truth

Cotincell Privy  
their authority.

Princes Allegi-  
ance not to be  
imposed but in  
case of Allegi-  
ance.

Scar-cham-  
ber.  
Bill of forgery  
in the Scar-  
chamber, failes  
by adding  
somewhat that  
is not in the  
writing.

Truth is a full charge of it self, fit for the Star-chamber, and to be answered. And it was further condemned as presumption to weaken the Action of a select number of Counsellors, chosen and appointed by the King himself; and therefore Sergeant Ashley and Hughes of Chancery were of his Council were ordered at the Council Table to make a submission, which they did.

But touching the informing secretes upon Allegiances in this Case, I delivered my opinion publicly in arguments, that the Obligation of Allegiance was not to be applied, nor laid upon private Causes, for no man could make a Cause of Allegiance other then such as the Law makes and as concerns the Faith and Loyalty that the Subject owes to his Sovereign in points of State.

### Meyres Case.

The Attorney generall did informe against John Mayres in the behalfe of the Lord Digbie supposing that he had forged a Lease of others Lands, parcell of the possessions of Sherborne, being now his in the name of Sir Walter Raleigh when he had it.

The Case now coming to hearing this being heard, it now fell out that the Information said that the Lease was of others things by name, whereof one piece of ground called Long Meare was said. Now the Lease produced and supposed to be forged, being produced, the ground called Long Meare was not contained in it neither by name, nor by general words, but all the rest of the things were in it.

Now the Defendant pleaded to the Forgery not guilty, and so the Court adjudged that as the Bill was laid he was not guilty, for it is not the same Lease, and it was an unnecessary curiosity and subtilty that marred the Case, he being of a stranger Age, if it had beene at the Common Law, he might have made his Information general. What the Forgery had debts of some one parcell whereof he had some more certain, (for some parcell certain there must be) inter alia as hath beene formerly adjudged and ruled in Patrickke and Cokes Case to the like effect.

M.17. Jac.

### Lancastell Ver. Sidley.

5. Case.  
Debt upon Ef-  
cape, by Execu-  
cour must be in  
the decinet.

Stephen Lancastell Executor of Richard Lancastell his Father did recover by a Judgement in the Kings Bench, against Sir Ralph Sidley, a debt of 100 l. upon an Obligation made by the said Sir Ralph Sidley to the said Richard, and 4 l. for costs; Sir Ralph Sidley afterwards was committed to Sir George Reynolds, being then Sparshall of the Sparshalls, in the execution of the said debt and costs, who suffered the said Sir Ralph Sidley to escape, the Plaintiff being not satisfied of the said debt and costs, upon which escape the said Stephen as executor of the said Richard, brought an action of debt of 104 l. against the said Sparshall, and declared in the debt and decinet, and upon non permittit ire ad litem pleaded by the said Sparshall, Stephen Lancastell the Plaintiff had a Verdict and Judgement against the said Sparshall for 104 l. debt, and 10 l. 10 s. costs.

The Sparshall upon a writ of error brought his error.

1. That the said Action might against him by the said executor, ought to have beene in the decinet only, and not in the debt and decinet. Vid. Col. Lib. 5. 31.

2. That the said executor in his Declaration against the Sparshall had not proved the Obligation of the Defendant his father, but concluded his Declaration with Et inde producti sunt et debet esse per Et proferre hic in Cur. Licet sit Petitioner pro Richard Lancastell, et the Judgement was ordered in the Exchequer Chamber.

Earle



Earle of *Clanrickards*, Case.

M. 13 Jac. Rot. 122.

**T**he Demandant brings a Formedon in the reverter of lands in Ewhurst and Salehurst, and declares that Robert Earle of Essex, and Francis his wife, 33 Eliz. levied a Fine thereof to Gerrard and Mills, which Fine was to the use of Elizabeth Sidney in Tail, the Reversion to the Lady Frances the Demandant and her Heires, and that Elizabeth is dead without issue, and that the right of the Tenement is reverted unto the Lady Frances, per formam doni: The Tenant vouches Richard Glyde and Kenrick Parry. The vouchers confess the feisin, Fine and use, ut supra. But they further say that Elizabeth married Roger Earle of Rutland, that the Earle of Essex died, and the Demandants intermarried; and that they for the consideration of money did levy a Fine of the said land (inter alia) unto Roger Earle of Rutland, and his Heires An. 3 Jac. by forces whereof the E. of Rutland was seised of the reversion of the Tenement to him and his Heires. And then they adde that the said Roger and Eliz. his wife, 7 Jac. levied another Fine of the Tenements to Causton and Screvin; which Fine was to the use of the said Elizabeth, and her Heires, and then shew that the Earle Roger died, and Elizabeth died without issue, and that the Tenements descended from her to the Tenant Viscount Lisle as her Heire and Heire, so this last Fine was pleaded to bring the Title of the reversion to the Tenant. But all the case and questions of it arise from the two Fines, 33 Eliz. & 3 Jac. saying that upon the Fine 7 Jac. the supposed extinguishing of the estate for the life of Roger Earle of Rutland depends.

*Vide, Residuum*  
*Sup. 1. &c.*

The Demandants reply as to one third part of the said Tenement, that the said Fine levied by the Demandant to the said Roger Earle of Rutland, was to the use of the said Roger and his Heires, during the life of the said Lady Frances the Demandant, and as to the other two parts of the said Tenements, the said Fine was to the use of the said Lady Frances and her Heires.

The Vouchers rejoine to the third part, &c. That the use was to the Earle and his Heires and traverse the limitation during life. And to the 2 parts residue they say, that the use was to the Earle and to his Heires, and traverse the use to the Lady Frances and her Heires.

The Jury finde as to the issue for the third part the feisin of Roger and Elizabeth in Tail, the reversion to the said Frances in Fee, and that the Demandant had no other estate in those lands in Ewhurst and Salehurst (so no Dower there) and then they find the Indenture 17 Jan. 3 Jac. between the Demandant and the Earle Roger for money containing a demise, and grant of their estate of the third part of the said lands (inter alia) to Earle Roger and his Heire, during the life of the Lady Frances Demandant. And the Covenant to make and do such further reasonable Aas and things as shall be reasonably devised for the better assurance, surety and sure making of their estate, of and in the said premises to the said Earle of Rutland his Heires and Assignes as aforesaid, and the Fine 3 Jac. upon it. And the Jury likewise finde as to the issue of the other two parts the intail and reversion and no other Title of the Demandant and the Indenture of bargain and sale of the third part and the Covenant of further assurance ut supra, and that there was no other agreement to lead the use of the Fine, but the said Indenture.

In the Judgement of this Case, I have considered these Points.

1. What quantity of land contained in the Fine, 3 Jac. doth passe unto the Earle of Rutland unto his own use and of what estate, and I am of opinion that there passeth but a third part, and that but during the life of the said Lady Frances, notwithstanding the generall Covenant of the Deed.

2. This being admitted since the Demandants have passed a third part during her life away, he cannot demand the third part, nor by consequence the whole as he hath done, except by some means the estate given in that third be determined

and extinct, which is made a second point, wherein I hold that it is not extinct, but that the Tenant in this action ought to hold the third part against the Defendant during the Ladies life, and that she cannot maintain her Formedon against her own conveyance.

Out of this it will follow, that she must be barred of that third part of her own holding, for she hath expressly confessed by her replication her alienation of that third part during her own life by the Fine. 3 Jac.

But then the question is, whether she shall be barred onely of that third part and have Judgement for the other two parts, or whether her whole Writ shall abate, inasmuch as she hath by her own confession falsified her Writ and Demand of the whole as she hath made it. And I hold that the Court ought to have abated the Writ for that cause.

The Defendants have grounded their Formedon onely upon the Fine, 3 Eliz. whereby the land was given to the Lady Eliz. in Tails the reversion left to the Lady Frances. And that the Lady Eliz. is dead without issue, and so it ought to revert per form donationis, whereas now upon the whole Case it appereth of the Defendants shewing to the Court, that since that gift in Tails made, the reversion was conveyed away by the Defendants by the Fine, 3 Jac. though returned unto her by way of use, and so alterations made of the reversion since the gift in Tails.

What will be the effect of this appearing to the Court of her own shewing and confession, and whether that were cause to abate the writ is a question, and I hold also that this was no cause to abate the writ.

What the Stat. 18 Eliz. of Jeofails will work in this case upon both parties: And I hold that in this case it cures both these causes of abatement. So I shall conclude that for a 3 part the Defendant is to be barred, and to recover the other 2 parts, for so much as is in question upon the speciall verdict, which is Ewhurst and Salehurst.

To the first point.

The truth of the case is, that of some parts of the land in the Deed mentioned, the Lady Frances was Tenant in Dower actual of the endowment of Sir P. Sidney; But of the lands of Ewhurst and Salehurst, which is the land in question upon the speciall Verdict she had neither Dower actual, nor Title of Dower, nor any other Title, but her reversion in Fee, as it is found in the speciall Verdict.

Whereupon I hold, that inasmuch as she had in Dower that very 3 part part by the Deed and Fine devised to the Earle of Rutland and his heirs, during her life and no other part: But where she had no Dower as of Ewhurst and Salehurst, the third part of the reversion in Fee did passe for her life and folow, and so the Sentence which is but one in words, hath divers operations according to the nature of the things whereupon it works. For though the Deed and the Grant contained in it be induc'd with a recitall that the Lady Frances did hold a third part of the Mannors and Lands in the Deed mentioned (whereof Ewhurst and Salehurst are parts) as of Dower, &c. yet then it proceeds that in consideration of marriage, &c. &c. devised and granted, &c. to the Earle of Rutland in these words all the state of them, the said Earle of Clanrickard and Lady Frances of and in all that the third part of the Mannors of Robertsbridge, &c. and all that their estate of 1 in the third part of all the Lands therunto belonging in Ewhurst and Salehurst. So that the words of Grant are not bound to the words of Dower recited, as if they had said all their Dower or Estate in Dower, or all her third part, which she holds in Dower, but loosely and at large all their Estate in the third part of the Mannors, Townes, &c. so the words being generall must not be frustrate in any part as they should be, if they were restrained onely to Dower. So that there is no cause to urge the necessity that the general Covenant should create any use of it selfe, because else there were no use of these Lands whereof there was no Dower, for therein you had my opinion cleare contrary. But now I hold that no more shall passe by this Deed and Fine but a third part of all in use to Rutland, though the whole were sold of the reversion

Clauses in company in a Deed how they shall be expounded.

of the whole: And yet I grant that if a man seised of Land in Fee, will Covenant with I. S. for money to do all Acts that he shall require for assurance of the Land to him and his heirs, and then ley a Fine to him that this Covenant and Fine will give him the whole land: For the Fine passeth the Land: and a Declaration of the use either expresse or in Law is sufficient, and this Covenant is no less then a Declaration, and it stands in its full strength without any other thing to qualifie it. So of this then would be no more question.

But now consider this Case which hath a Fine and a like Covenant also in words, and yet shall pass but a third part, whereof the reason is the wisdom and the benignity of the Law, that being to judge of an Act, Deed, or Bargain consisting of diverse parts containing the will and intent of the parties, all tending to one end, both judge of the whole, and give every part his Office to make up that intent, and both not break the words in pieces.

Now here the deed contains the bargain, which is a grant for money of all the estate of the Earle of Clanrickard, and the Lady Frances, of the third parts of severall things, to the Earle of Rutland, by severall distinct Clauses: Then folloves the Habendum to limit the Estate to the Earle of Rutland (which was not before, though it might have been) in these words. To have and to hold their Estate of and in their said third part, &c. to the Earle of Rutland, his heirs and assigns during the life of the Lady Frances.

So these two parts the premises, containing the grant it selfe and the things granted, and the Habendum containing the Estate, have done their Office clearly and without ambiguity, and have given every their third parts, and of a limited Estate expresse. Then followe the ordinary Covenants attending upon this Conveyance, one for perfecting of this Conveyance by further assurance, the other for well enjoying of that that is conveyed.

Now who sees not, that the Office of these Covenants (when they follow in expresse grant) is not to give any thing, but to assist, further, and support, being as a wall or monument about it. And therefore cannot be understood to exceed that whereunto they are said to be but adjuncts, according to the Rule of the great Officer: The adjunct cannot be above the power.

And because it may appear how slender it will be, to take these Covenants as if they stood alone without respect to the whole context and intent of the deed.

The first of these two Covenants is, that the Earle of Rutland, his Heirs and Assignes, shall at all and every time and thence hereafter enjoy the third parts discharged and freed harmless of all Titles of the said Earle, or Lady Frances.

This Covenant, though it be restrained to the third parts, yet it is not restrained to the Heires (as elsewhere) but at large, for all Heires of the Earle of Rutland, and at all times, that is, for ever; yet no man would judge this Covenant for an Heire of the Earle, after the death of the Lady Frances, for it is against Sense and Nature, that I should Covenant that their Heires should enjoy the estate, that were plainly excluded from the lands by the limitation: yet if this Covenant should be clearly, it would reach to all Heires, and so ever, according to the words. Can you see that Clauses in Company have other Constructions, then when they are alone.

Now this other Covenant for Assurance, is clearly restrained likewise to the limits of the bargain, by all the parts and words of it, as well for the third parts as for the limited Heires, for these apparent reasons.

- 1 First, it is joined to the former Covenant of enjoying, under the same line and Covenant as depending upon it, which was expresse only of the third part.
- 2 Then it is for other and further Acts.
- 3 Then, that those Acts must be reasonable, and reasonably debited, therefore not differing from the bargain.
- 4 Then, that they must be for the better Assurance, Security, and sure making, which are all governing by the word (better) and must be for the better of that that was before.



**Asse,** of the Estate, (not, of all their Estate, as the Comcoill have reported; it) to the Earle of Rutland his Heires and Assignes, as aforesaid.

**Point** they that Object make this only word [their estate] and passe by all the rest that serve to Declaration and Restriction. Note it is not [all their estate] *Cafe Snuckley & Butler, Hil. 12 Jac. Rot. 827.* The Earle of Suffex Lord of the Mannor of Cleave sold to George all his Mannors, Timber and Trees growing super totum illud Manerium de Cleave; viz. upon three Coppices named, to all agreed, that if the word totum had not been, the viz. had restrained.

**Point** I say, that considering all the former parts of the deed, being expressly for thirds, and an explanation of this very Covenant by the former observations, their estate in this Case shall be understood not the estate at large, but their estate granted; and much the rather, by reason of the closeness of the words as aforesaid, which (as it is confessed by the other side) limits the generality of the heires, by the intent of the rest of the Deed. And standing indifferently in the end of the Covenant, both likewise extend it both to the thing and estate given by the like intent and upon the same reason, the rather because there is no violent word [of all their estate] so it shall be of the same sense, as it be had said (their estate to him and his Heires, according to the true intent and meaning of these presents) or, (their estate in all the lands aforesaid) to the Heires aforesaid. But there might have been more doubt, if the words (as aforesaid) had been placed thus. What he should make further assurance to him and his Heires as aforesaid, of their estate, &c. And yet I would not have doubted much even of that as I observed upon the former Covenant of enjoying, that speaks of Heires at large without restriction as aforesaid, for Covenants, Conditions, reservations, &c. all amount, to all intent and purpose to the grants.

And this is the very reason of the Judgment in the Lord Russell's Case, Co. lib. 11. 51. where a Farm was granted, excepting one close by name, and the Lessee covenanted to repair the fences of the Premises, and it was adjudged; That the Covenant did only extend to the named Premises; And the law is said to have been adjudged, 10 Eliz. upon a writ of Error between Lords intended for Abutments, the word (Premises) in the like Covenants, shall not reach to the Abutments; yet the word Premises in his last and large sense is as much as premonitionaria prenominate, as Monague in Dives Case Plow. But a just man in his exposition must remember the rule oculum ad iterum, he must keep his eye upon the words, which is, that the Covenant which he has taken, and is guided by the law, which is the estate. And therefore in the same Case of Liford is cited a Case, judged between the Earle of Pembroke and Simonds, which was that the Earle of Pembroke granted to Sir Henry Barly the custody of Stafford Castle, and Brookham twille, in the Forest of Froome-Sellwood by his life, and then by another Deed confirmed his estate in Brookham twille, and by the same Deed granted Stafford twille in the Forest of Froome-Sellwood to him and his Heires males of his body, and then certain Proviso; Condition, That if he cut any Trees in the Premises, that then his estate should cease, and then Barly cuts Trees in Brookham twille. And it was resolved that the word (Premises) should extend unto that, namely the Deed had operation upon it by way of Confirmation, but it should not extend to the other parts of the Forest of Froome-Sellwood though it were named, because the Deed is to be kept not upon them: which Case is said to the purpose, a Condition being a thing attending and applying it self to the estate and Covenant say.

And upon the same reason in Lord's Case, Co. lib. 10. 106. where one made a Lease of a Cellar for a year, and it in the end of the year the parties made a lease that the Demise should continue; then to have said to hold the same for three years reddendo inde annuatim durante dicta tenore. 20 s. And it was adjudged, that the reservation did extend to the first year, though to hold no longer, for the Reservation is attendant upon the Lease, and the word dicto Tenore is indifferent to both Tenants: And thus is an exception to, warrants, the Case 6 E. 2. Title of Vouchers, 258. A. gives land to J. S. and his Heires, &c. go

et heredes mei warrantabimus, nec sapio in hoc, to whom, nec at what estate, yet all supplied out of the grant. For the Law intakes stature, that gives proportion to every Member conformable to the body, that nothing be monstrous or deformed.

So then we proceed upon this ground, That a third part and no more is granted away, during the Demandants life; in respect it followeth, that for the same third part, the Demandants must be barred for want of right appearing to the Court, though the issue be that third part to have by the Demandant against the Tenant. That the use of the third part was to the Earle of Rutland and his Heir, during the life of the Lady Frances only.

This generall Position is not much denied by the Demandants counsel, but they shew it thus.

They say that when after, 7 Jacob. the Lady Elizabeth being Tenant in Tails in possession, and the Earle of Rutland her husband being Tenant for life in Reversion, agreed in the presence of Gorton and Scriven in Fee, that this should be a discontinuance by the Fine of Tenant in Tails, and to the Heirs for life his Heirs and assigns for ever.

So that when the Issue determined, the Demandants Reversion was to come in being, the estate for life being before extinct in the estate given by that Fine 7 Jac. which is by this Formedon in Reverter to be defeated, if the estate for life be extinct, I mean so, that it shall run not to benefit of the Comdors to whom it is given, but to the old Remainder of Reversion, it must be either by surrender, or forfeiture, or confirmation. By surrender it cannot work. For that this could not touch by way of surrender, as in Redons Case it might, because it is a remainder following, and yet there it toucheth rather as a surrender, for then it had been against the Judgment.

To this I answer.

First, that the Estate for life is not by that Fine 7 Jac. dissolved and extinct, but that the Estate in Tails and for life are both continued substantially as estates in being to these Comdors.

First, the Estate for life is not dissolved by this Fine.

Secondly, it is not subverted in the Estate given by the Tenant in Tails, but it is given distinctly as an Estate by it self in Judgment and by the force of Law.

And here first I do exceedingly commend the Judges that are curious and almost subtle. Alas! (which is the words used in the Proverbs of Solomon in a good sense, when it is to a good end) to intent reason and wisdom to make Law, according to the just intent of the parties, and to avoid wrong and injury which by rigid rule might be wrought out of the Law. And that is well performed in Redons Case, Co. lib. 1. fol. 70. where a Tenant for life, was to have Remainder in Tails to a Fine (Comdors) the Tenant in Tails died without issue, the Comdors held the land during the life of the Tenant for life. Note in Redons Case a strange effect, for the Comdors had a Fee simple of both Estates, as soon as Tenant in Tails died without issue, yet but an Estate for life, for there was no discontinuance nor change of the Reversion, but a full giving of these Estates and no more, as in English Case there.

There is no forfeiture in this Case, because the Tenant for life gives not the Fee alone, but gives away so much of the Fee as he hath his joined with another in giving a Fee, that both parties in giving a Fee during his estate, without trying to say, and therein differs from M. 16. & 17. Eliz. Dyer 355. Of Tenant for life, Remainder for life joining in a Feoffment in Fee, and from 21. E. 3. 21. of Tenant for life, making Feoffment in Fee to him in the Remainder in Tails and his heirs. And if we read (as in Redons Case is added by continuance, it was settled) that the Remainder in Tails should be taken to pass first, so here to avoid forfeiture, the Remainder in Tails may be said to pass first or last.

It is also no discontinuance, because either of them gives their estate lawfully, and there is no necessity to conceive a wrong to the Reversion, since a Fee may

may be determinable by operation of law, as in *Bredons Case*, though it should by the Fine have been a perfect Fee, if there had been such an one to give. And Coke in that Case collects, that by reason of that Case if Tenant for life, and he in remainder in Tale, make a Feoffment by Deed; that this shall be no discontinuance, nor shall defeat the reversion or remainder depending, because it shall amount but to a grant of both their estates, and so it shall be a Fee determinable upon both their estates, and no absolute Fee from the one nor both, whatsoever the word imports, the one construction working by right, the other by wrong, which the Law will not admit if the other may by any means stand. So since these estates might have been severall without forfeiture, the Law shall marshall them joining accordingly. So that this way, though the Tenant in Tale in possession should make a discontinuance, and so work a wrong, yet the grant of Tenant for life in remainder might be lawful.

Take my opinion upon *Englishes Case* hereafter. Those things standing thus, it must follow, that the estate for life doth not pass dissolved in the Tale, as giving place to it. But it is true, that both the estates that were in them severall, did passe from both as distinct Authors of the new estate, according to their measures.

But now in the *Comtee* they are but one intire state made of two, and therefore removed the *Comtee*, as Chymists doe, by extracting and segregating the simples of a compound. As suppose this conveyance were upon condition, the entry shall restore their estates as they were before; so in *Englishes Case*, in *Bredons Case*, the *Comtee* took two estates, and from two givers; Tenant for life and an Infant in remainder by Fine. The *Comtee* now had but one estate, yet upon reversal of the Fine, the Law restores no more to the Infant, but the remainder, because he gave no more, yet the estate for life, was as in this Case given, conformed in the Fee, and no forfeiture made in *Englishes Case*. So in this Case I hold it cleare: That if an Infant Tenant in Tale in possession, and he in remainder for life had joined in a Fine, and the Infant had reversed his Fine, yet the remainder for life should have vested with the *Comtee*.

Then again, admit it should be taken as a Discontinuance of the Tenant in Tale, and a Confirmation (which is the least) of the Tenant in life for reversion, who had that estate by the grant of the Donee himself, what colour is there then, that the Donor should recover the Land, as long as that estate is out, that himself gave; no more then, if the Tenant in reversion had not joined but kept his right, or released it to the Discontinuer. And therefore put the Case, that A. Donee in tale remainder to B. for life, reversion to C. in Fee, A. discontinue at the Common Law, this is a present wrong to the issue in Tale, and to B. and C. but such as none can remedy but in their severall times: so that if the issue of A. sue not, B. cannot, if B. sue not, C. cannot, by the same reason if B. will release to the Discontinuee, or confirm his estate, it is all one to C. for his estate or right is not thereby anticipated, for there was nothing taken from him but his reversion, which is all that he can require.

But if in *Bredons Case*, the Tenant for life had surrendered his estate to the Tenant in Tale in the first remainder, who had levied the Fine and died without issue, he in the second remainder might have presently had his Forfeiture, though the Tenant for life were alive, for the estate for life was so dissolved, as there was no more but the estate in Tale with the other remainder following. So the difference is, where the Tenant for life in *Bredons Case* surrenders, or in the Case releases to the Tenant in Tale before the Alienation, so that he hath all and gives all, one giver, and one estate onely. And where there is a joining in the conveyance, or a releasing or confirmation to his *Comtee*, in which Case it is cleare, that he gave but his own single estate, and the other remains to be given by the proper owner.

But that that troubles the Judgement in this Case, I suppose to be the booke of 9 Hen. 7. 25. and the opinion Co. lib. 6. 70. so in Case, That if Donee in Tale be



he disseised, and the Donor disseise that disseisor, and make a feoffment over, and then the Donor reenters upon the feoffee, he shall have but his first estate shall, and the Reversion shall be turned to the first disseisor, and shall not remain with the feoffee of the Donor, whereas the reason is, That where the stranger disseiseth the Donor, hee gained by wrong both the Title and the Reversion, and then had in him one entire estate in Fee: Now when the Donor disseiseth him, he gains the estate which the disseisor had, which was entire and so his disseisin cannot divide the estates as they were, for his whole estate is by the wrong to the first disseisor, none having right of entry, but the Donor, then when he makes his feoffment over, that gives no estate but that wrongful one: But it gives away his right also, not by granting but by disowning and dying in the land. So then when the Donor reenters, he can have no more than his own, and must by his entry restore the Reversion: The feoffee cannot hold the Reversion because the estate he had was no other then that was wrongfully gotten by the Donor from the first disseisor and given to him, wherein there was in effect the title of the Donor and the reversion of the disseisor, and now when the Donor reenters he cannot restore the reversion to the feoffee in respect of the right, because it is utterly annihilated by the feoffment which cannot give but doth extinguish it.

And now you must see no other right but that which grows out of the disseisor, whereas the first is both the best in estate and right, and therefore if the first disseisor had entered upon the feoffee of the Donor disseisor, and then the Donor had entered upon him, no doubt the reversion had been left in the first disseisor, and then the feoffee had no way by his buried right, to recover it now or after the death of the Donor without issue, so here difference appears, that in this case the first disseisor hath right to the whole estate, wherein the right is buried, and so redounds to his whole benefit: In the principall not so, for the Lady Frances had right onely to the reversion in Fee after both the estates ended, whereas the one helps the other.

So note that the right doth extinguish whether it be by feoffment, release or confirmation, to the benefit of the estates then last in being, as of the first disseisor. Much more here of the discontinuance being now in esse, not to the benefit of the ancient right, for one right cannot extinguish another.

That though the Demandant is to be barred of the third part onely, yet it is cause to abate the Writ, being a willfull deserting or departure from his Writ and Demand.

3 Point.

Now then admitting that for the third part, the Demandants are to be barred upon their own confession direct according to my opinion, which must be peremptory and small for so much, though there might have been a good Action for the whole, if they had tarried their time till after her death; I hold that the Demandant can recover nothing in this suit, but the whole Writ is to be abated, for the Writ is falsified of their own shewing, and that in a substantiall part, and not in point of form: For it appears, that they have no right of Action at all for this third part. As if a man should demand a debt of twenty pound, and confess that he hath no right to ten pound of it, or demand an hundred Acres, and confess that he hath no right to fifty of them, no doubt the Court Ex officio, or the party either by Plea in abatement, or as Amicus curie at least might take knowledge and abate the Writ.

But if they went on, to issue and a Verdict given, where the Statute gives reliefs, it doth as well when it appears of the parties shewing as otherwise, 14 E. 3. F. 17. Formedon in descender the gift was traversed to all, after, the Demandant said they were agreed, The Tenant to confesse the gift for part, and the Demandant to confesse no gift for the rest; the Court held that by this the Writ should abate, wherefore Judgement was first given against the Tenant for the third part, and against the Demandant for the rest.

Et 9 H. 6. 34. One brought a Writ for two writings, and for one made no Title; Babington was of opinion, that though this be a barre for that, yet it may be

## 4 Point.

be pleaded in abatement for all, as being more to his advantage. But if it were only some Writings, then it must be in barre as the writter. But then if it were found by Verdict, it were otherwise. So there likewise when a Formedon is brought of Land and Admonition, which is also one generall Point of Godfrey's Case, Co. lib. 11. 45.

The alterations made of the reversion since the gift in Tale by the Fine, 3 Jac. are true, one by the gift of the third part to the Earle of Rutland during the life of the Lady Frances; whereof we have spoken.

The other the conveyance of the reversion in Fee simple as well of that third part after the Earle of Rutland's Estate ended; as of the other two parts, both which are to the use of the Lady Frances and her heires as it was before.

As the second I doe agree, that if there be an alteration of the Reversion, whereby it is made another reversion then it was before, that it must be mentioned in the Writ, so is Wisemans Case, where the reversion that was in Fee, was turned into an Estate in Tale, though in the same person.

And Fitzh. Nat. Br. 219. F. Register 242. where an Estate for terme of life was interposed though ended, yet there is a Writ mentioning that Estate be terminated.

But here the reversion for the two parts, is the very same in Law in the Donor, that it was at the first, though it be in her now by a second means, that is by this 2 Fine to the old use. Wherein observe Bo-kenhams Case 28 Hen. 8. Dyer. 7. fol. b. which was, that Bo-kenhams being Cestuy que use before the Statute of land holden by Knights service, Jay and others being his Feoffees, did Intestate Jenor and others to the use of Bo-kenham and his wife, and after their decesse to the use of Bo-kenham and his heires: Bo-kenham died, and this was adjudged to be a Reversion and the old State. And in this Case, Willoughby cites a Judgement of the Lord Roser's, which came to this: That a man being (as Baldwin puts it) Cestuy que use of two Acres, one by priority, and the other by posteriority, made a Feoffment together of both, yet the priority remained.

Now, though when the Lady Frances with the Earle of Essex levied the Fine, she had no use, as in the other Cases, but Land in possession, yet she raised both the Estate in Tale, and her owne reversion by uses. And though lands and uses cannot now stand divided, as they did before the Statute, yet the owner of the land hath power to give the use as he did before, and the Statute couples the lands unto it, as it did when it found land in use at the making of the Statute. And as upon the Fine of 33. there was first an use which was Judged in Reversion, and then the land followed in the same degree, so the second Fine by the help of the Common Law revives the same use, being of the same reversion, and the Statute makes it in the same degree, and the rather, because there is no expresse use in either but the use made by Law.

But that it was a fault, take the Case of the Register, & Na. Br. Stronger, considering that there the Fee of reversion was never stirred, here it is, so that you must pleade upon this Statute, that by force of that Conveyance and Statute you are seised not by force of the first Conveyance. And so it may serve if you had granted the reversion upon Condition and Reentry.

It may be objected that the Tenant or Voucher in this Case, could not plead this matter in abatement for two causes. First, because they had pleaded a Plea in abatement of the Writ before, which was judged good against them, and the Court awarded that they should answer to the Action of that Writ.

Secondly, because they had pleaded in barre, and therefore could not resort back to a Plea in abatement, and both are true.

But I answer, that there is no Plea in abatement whereof the party needs speake as of Pleas in abatement arising dehors the Record, and whereof the Court can take no knowledge.

But in this Case, where the Cause appears to the Court either of the parties own shewing, as here by variance from the Register in the very Case appearing,

pleading, or by false Latine, or the like, in such the Court may and ought ex officio to abate the Writ at any time. And if the Tenant or Wouchee shall inform the Court of it, he is in that but Amicus Curie, and this Information is not so small in pleading, nor in Court, but verball, and may be done any where, and by any body. As in the Case of 4 H. 6. 16. in a Formedon brought by the Duke of Yorke, against the Earle of Warwicke at the summons returned, the Tenants were demanded and essoined, and the Essoynner pleaded in the abatement, that the Writ was Dux Hibernie, where it ought to be Dominus. And it was said per Cur. that the Essoignes can pleade nothing, but he may onely demand the Demandant to make him Responde, therefore he shewed this as Amicus Curie. For it was agreed that the Court ex Officio, ought to abate when the fault is apparent.

Dux for Dominus.

And therefore I condemne the Case 40 Edward 3. 35. when a Formedon in descender was brought of twenty Acres, which with other twenty Acres, J. S. gave B. and the Demandant held him in simul cum D. After viero the tenant pleaded this abatement, and it was denied him as an exception not rising from viero, which was true as of his Plea, but it was the Office of the Court, F. N. B. 26. It must be of parts undivided, and before partition the Insimul, so then it remained a fault, whereof (when it appears to the Court of the Plaintiffs shewing) advantage might bee taken to abate the Writ in such manner as aforesaid.

Now the onely question is, whether the advantage being waivered, after it might have been taken, and the parties descending to an issue, and verdict found by twelve men, whether the fault in the Writ be remedied by the Statute of Jeoffailles 18 Eliz. c. 13. And (I) hold plainly it is: And because this Statute and the like, are of soveraign use to cure those petty mistakes that arise of these various forms of Law; I will tolere my selfe upon it, and I promise that I will enlarge the extent upon the Statute, so favourably, as I remove no substantial point or mark, norke between right & wrong; And therefore I do not very well like the opinion of M. 1. h. & 2 P. & M. cited in Sir John Heydons Co. 1. 116. That a verdict between a Demandant and a Wouchee, shall be out of the remedy of the Statute of 22 H. 8. the words being (when the Issue is tried for the party Plaintiffe) surely he is a party both to the suit and issue and the Comment I also (which is the mother and patron of Reason to a Statute) allows him a party to take a verdict from the Demandant as well as the very Tenant, but he is no party to the Originall Writ. It is true that Originally he is not but by substitution of the party allowed by Law, and he may plead in Abatement though he may also extend the warranty of the Tenant having not taken Pleas in abatement; & Delate ries the party must take rather then put the third person to his warranty, which was intended alwayes, viz. refugium. But who requires this Writant? It is not said party to the Originall, and the Statute says Plaintiffe or Demandant generally, not saying againe the party Tenant or Defendant. And then, why may not by good reason, the two Clauses for the Tenant or Defendant be enlarged, to answer the reciprocall intent of the one number, rather then to restrain the former by the latter, especially since it is clearly true, the issue found for the Wouchee, is found in effect for the Tenant and the Demandant thereby clearly debared?

5. Point.

Hobard.  
A fault in a Writ remedied by Statute of Jeoffailles of 8 Eliz.

But the other Clause found for the Demandant cleary, is within both words and meaning; for it is so; the Demandant, and bee both Judgement upon it against the Tenant, and the Tenant over against the Wouchee. And that is one Case that the Verdict here found is for the Demandant for two parts indeed, and for the other part also, arguing this point as I doe; though for the third part in it self it be a bar, yet it makes but for in as to the abating of the whole writ for the rest.

And though the Statute is want of an Originall writ, not want of an Originall generally; yet in a Case between Wells and Woodhouse, where Wells brought a Trover in the Kings Bench against Woodhouse, and after Verdict



assigned to; Error, the want of a Bill; It was resolved in the Exchequer chamber, that the want of a Bill in the Kings Bench was no Error; for a Bill was in lieu of an Original: And therefore was within the remedy of 18 Eliz. And so it hath been oft adjudged in the Common Pleas that the want of a Bill for or against an Attorney is holpen by the same Statute. But this Case of ours is not subject to that doubt of 1 & 2 P. & M. though the issues were between the defendant and plaintiff. For it is not within 31 H. 8. but within 18 Eliz. being a fault supposed in the Writ, and that Statute being in generall words, (If any Verdict shall be given in any Action, &c.) without mention between what parties as 31. d. b. So now the onely question is, whether this fault in the Writ (supposing it a fault) be within the remedy of 18 Eliz. 13. wherof the words are, If any Verdict of twelve Men or more shall bee hereafter given in any Action, Writ, Bill, Plaint or Demand in any Court of Record, the Judge-mast shall not be stayed or reversed by reason of any default, or lack of forme touching title, L. atine, or variance from the Register, or other defaults in forme in any Writ original or judiciall; wherupon first it is to be observed, that the faults forbidden by the Law must be faults in forme, as forme stands in opposition against the matter in Law and very right, which words are expressed in the Statute 17 Eliz. of Donations, which are of the same nature, and are tacitly excluded also out of this. And therefore the point of variance from the Register, must not be in matter of Law or very right, nay though you have very right, you must not vary from the kind of Writ that is proper to your right, But if you keep the kind or species, you may vary in forme. Wherefore if you take a Formedon in descender, where your right is by remainder or reverter, or e converso, it is not holpen. For if you take reverter for remainder, though both arise from an Intail made and ended; and thereupon the land falling either to the Dones or his Assignes, I hold it unalterable, (yet in grants that may serve one for another, as 18 E. 3. 38. Plow. 170. redibunt in a stranger) For these kind of variances are not variances from the Register, but variances from your Case and Title, for the nature of a reverter is like as in a remainder to referre you to the land according to your Title. (So if an Action of debt be brought against an Executor in the Debt & Detainer, the Verdict helps not, for it differs in nature and judgement, the one charging the proper goods of the Defendant, the other not.) And yet in a stronger case Lancaster Executor recovered against Sidley, who being in execution in the B. Bench, escaped, & then this Executor brought a new action of debt in the B. Bench, in the debt & detainer against Sir George Keynolds the spot shall, and had judgement after verdict, which was reversed before us in the Exchequer chamber, and yet the words of the judgement were of the part of the Plaintiff all one, but the other differs, for the debt and detainer is for his owne use, and the detainer onely for the Testators. But there are forme curable, as in a Formedon in descender the defendant in his writ must make mention of every heirs, to whom any right is descended after discontinuance, though they were never seised, Buckmires Case, Coil. 85. 88. or else it may be pleaded in abatement, & so is Fitz. Nat. Bt. 100. D. & 18 E. 2. Formedon 391 for conveying the line of the Dones in Formedon in Reverter, yet I hold both these omissions cured by the verdict, provided that they make themselves heirs to the last that was seised by the force of the last, or to the first Dones, for that is material. See Fitz. Nat. Bt. 118. D. & 119. E. If the Dones grant his reversion in Fee, the Grantee shall have a Formedon in reverter, but if he grant his reversion in Tail, it shall be in remainder; yet I hold that a verdict will help, although it be made reverter upon the Intail; because it is true that hee hath reversion in Tail, and hath coincident unto it. Scholasticas Case. Assize was Summeas quod sint coram prefat. Justiciariis. The Writ was altered, but if it were at this day after Verdict, it would bee good. And though in Bracebridge his Case, 14 Elizabeth Plow 424. he were of Opinion that where an Ejectione Firmæ was brought of Land upon a speciall Verdict, the Court judged

one halfe undivided for the Plaintiffe, and the other halfe against him; Plow. was of opinion that the Writ ought to have abated; yet all common experience at this day is against it after Verdict. And this I hold for a Rule, that where the Statute of 18 Eliz. doth cure a fault in form after Verdict, it workes that effect as well where that fault in form appears by the confession of the party, as otherwise; for the Statute is generall without difference. So I hold it at the most to be but a fault in forme departing from the Reglter. When the Writ demands the whole, and the Right is but an undivided part.

*Adams* Vers. *Flemming*.

Hil. 16 Jac. Rot. 890.

Cafe:

**A**Dams brought an Action upon the Cafe against *Flemming* for speaking of these words, viz. he hath forsworn himselfe before the Council of the Marches, meaning his Majesties Council in the Marches of Wales, in the Suite I had against him there; and I will sue him for perjury there and after a Verdict for the Plaintiffe upon not guilty pleaded; it was moved by Master Serjeant Chibborne in arrest of Judgement for the insufficiency of the words, because this Court cannot take notice of the Council, &c. And yet Judgement was given with the Plaintiffe, for tenn pound damages and costs.

He hath forsworn himselfe before the Council of the Marches of Wales.

Judgement.

*Hannor* Vers. *Mase*.

*Audita Quer.*

**H**annor brought an *Audita Querela* against *Mase*, upon a Judgement for debt and costs, and shewed that he had a Release after Judgement. The Defendant pleaded that after the Judgement, and after the release supposed to be made; he sued forth a Scir. fac. upon the same Judgement, and that upon this Writ hee had Judgement to have execution by default. And it was moved by Serjeant Harris, and a Case was cited by him 12 Hen. 7. in Justice Cookes Reports, fol. 11. That if the Defendant after Judgement have a release made unto him by the Plaintiffe, and after the Plaintiffe sues a Scir. fac. upon the same Judgement, and the Defendant being garnished makes default, and execution is awarded, he shall never have an *Audita Querela*. Otherwise it is, if a Nihil be returned upon the Scir. fac.

In what case an *Audita Querela* shall not be had

*Castilion* Vers. *Executor of Smith*.

Tr. 17 Jac. Rot. 1849.

Obligation.

**C**astilion brought an Action of Debt against the Executor of *Smith*, upon an Obligation made by the Testator, with Condition for performance of Covenants in an Indenture, in which there is a breach assigned for plowing of Warb Lands, by the Executor himselfe after the death of the Testator. And it was moved by Serjeant Henden after Judgement, to have execution of the Executors owne proper goods, for that the breach of the Bond was by the Act of the Executor himselfe. And the Court was against him, and Judgement was entered *De bonis Testatoris*.

Judgement. *De bonis Testatoris*.

*Edwards* Vers. *Engleton*.

Tr. 17 Jac. Rot. 944.

Trespasse.

**E**dwards brought an Action of Trespasse against *Engleton*, for that with force and armes, hee for he and led away *Quendam canem venaticum prec.* &c. And after Verdict for the Plaintiffe, Judgement was given for the Plaintiffe by the Court.

*Canis Venaticus*.

Judgement.

Battery.

Hunt Vers. Lawring.

Tr. 17 Jac. Rot. 944.

Test of the  
Original.

**H**unt brought an Action of Assault and Battery against Lawring for beating of his servant, by reason whereof he lost his service, &c. for a long time, and declares that the Battery was done on the 19 of January in the 16 years of his Majesties Reigne that now is, and that he lost his service for a long time, viz. for the space of six months then next following, and after a Verdict for the Plaintiffe, and entire damage assessed it was moved by Serjeant Ashley, that the original did bear test before the end of the 6 months. And yet the Court gave judgement for the Plaintiffe, notwithstanding this exception, for that the videlicet is more then needs.

Judgement.

Trespasse.

Green Vers. Harrington.

Tr. 17 Jac. Rot. 923.

Assumpsit upon  
promise.

**P**eter Greene brought an Action of Trespasse upon the Case, against Thomas Harrington, That whereas the Defendant 26 of October in the 16 years of his Majesties Reigne, was indebted unto the Plaintiffe in tenne pound for Rent in arere, and unpaid unto the Plaintiffe for one peare, ended at the Feast of Saint Michael the Archangell, then last past, for certain Lands in Harrington demised unto the foresaid Defendant by the said Complainant, the said Defendant in consideration thereof did assume to pay the said tenne pound, whensoever he should be thereunto required, &c. The Defendant pleaded that he made no such promise. And after a Verdict for the Plaintiffe it was moved in arrest of judgement, that this was no sufficient consideration, but that he had good remedy by action of debt, for his Rent, and he could not have two remedies. And the Court will be well advised.

Trespasse.

Steward &amp; Uxor Vers. Sudbury.

Tr. 16 Jac. Rot. 1655.

Declaration  
excepted  
against.

Judgement.

**S**imon Steward Esquire, and Dorothy his wife, brought an Action of Trespasse against Humphrey Sudbury, for that with force and armes he brake the close of the said Dorothy, when she was sole, and cut and carried away the Thornes and under-woods of the said Dorothy, &c. and declares upon the cutting of two Acres of under-wood and Thornes, after not guilty, the Plaintiffes were non-suits at the Assizes, and the Plaintiffes moved that the Declaration was not sufficient, because Acres of under-wood, &c. was not good, and so prayed, that the Defendant might not have costs. But the Court gave Judgement against them for the Defendant that he should recover costs.

2 Delive-  
rance.

Gayhard Vers. Miller.

Tr. 16 Jac. Rot. 3124.

Non. fac. where  
to the Mannor,  
where to the  
Towne.

**I**s a second deliverance, for taking away of his Horse at Wikefz-paine, in quodam loco vocato Dye places. The Defendant says that the place where contains twenty Acres parcell of one thousand Acres, &c. which one thousand Acres are and time out of minde were parcell of the Manour of Wikefz-paine in the Countie aforesaid, of which Manour Henry Carle of Northumberland was seised in Fee, and acknowledgeth the taking as Bailiffe to the said Carle. The Plaintiffes traverseth absque hoc quod locus in quo, &c. suit parcella



parcella Manerii de Wikefitz-paine, the Ven. fac. was awarded de vicineto de Wickfitz-paine, &c. And after triall and verdict here at the Barre, Judgement was stayed Pro defectu de Ven. fac. because the Ven. fac. ought to have beena De vicineto Manerij, &c. and not De vicineto of the Towne.

**Mannors Vers. Bishop of Lincoln and Naylor.**

Pasc. 17 Jac. Rot. 460.

**I**n a Quare impedit. brought by Mannors, Plaintiffe against the Bishop of Lincoln and Naylor. The Plaintiffe declared that one Terwhit was seised of the Mannor, ad quod, &c. in Fee, and devised the same to the Plaintiffe for peares, and that the Church became void, and that Terwhit the next presented by usurpation one that was admitted and instituted, and that after the said Mannors being possessed of the said Mannor ad quod, &c. the Church became void by reason whereof it appertained to him to present &c. Whether this were a good Title in a Quare impedit, is the Question in Dispute.

**Balder Vers. Blackborne**

Tr. 17 Jac. Rot. 465.

**B**alder brought an Action of debt against Blackborne for twelve pound, and declared upon a Demise made by the Plaintiffe to the Defendant of one Messuage, &c. the 14. day of May, Anno 13. habendum usque Festum sancti Michael, next following, and so from yeare to yeare, &c. yielding twenty four pound Rent per annum, &c.

Upon Nil debet per patriam pleaded, the Jury found a speciall Verdict, that one John Wells was seised of the said Messuage, &c. in Fee, and held the same in Socage, and by his last Will in writing, devised the same Land, &c. to Anne his daughter, and to her heires for ever at the full age of 18. yeares; and further devised, that my Wife and Executors shall have the education of my daughter with her portion of money and profits of my Land to her own use, without account, untill my daughters age aforesaid, provided that the said Executors shall pay the quit Rents and Fines, &c. And keep and bring up my daughter at School, &c. and made Alice his wife his Executrix, & died. Alice proved the Will, and tooke upon her the charge and execution thereof, and married with one Richard Porie and after died; and that the said Porie assigned over his interest to the Plaintiffe, who devised it unto the Defendant prout in the Declaration. And that the said Anne is living and under the age of 18 yeares, viz. of the age of 14. yeares and that the said Executrix hath performed the Will of the Testator.

And without much difficulty or doubt, the Court upon view and reading the Verdict, gave Judgement for the Plaintiffe. For it is a plaine terme given to the Wife to her own use, which accerues to the Husband, and the keeping and education of the Child is not of such particular perty but it may be performed effectually by another.

Roberts

Replevin.

Roberts Vers. Young.

Tr. 16 Jac. Rot. 1700:

**R**oberts against Young in a Replevin, for taking away of his Cattell at Aller in a place called Land Mead. The Defendant doth acknowledge the taking as Baptiste to wit John Davis Esq. the High Sherjeant at Law, in a place containing four Acres as in his free hold damage Felant. In bar of this Cognisance, the Plaintiffs pleads that Henry Earle of Huntingdon was seized of the Mannor of Aller, whereof one Messuage, &c. is parcell and demisable by Cope, and that within the said Mannor there is this Custome, that every customary Tenant of the said Messuage, &c. have used to take Common of Pasture, &c. in the said place, called Land Meadow, and to be riden up & down by Cope. The issue is upon this Traverse, abque hoc quod infra Mannorium talis habetur consuetudo quod quilibet tenens customum, &c. habeat iura de Cope, &c. proit, &c. and after a Verdict for the Plaintiffs, it was moved by Serjeant Harris that this was no Custome, for that it both not appears in the pleading that the place in quo &c. est infra Mannorium, because the Custome of the Mannor cannot extend out of the Mannor, but he ought to prescribe in the Lordship of the Mannor, &c. And the Court will be advised.

Custome of a Mannor cannot extend out of a Mannor.

Notes that the dividing of a Common from the Mannor, cannot prejudice the Common, also there is nothing more common, than for the Lords to prescribe for his Tenants by Cope in another mans Land, whereas if it be in his owne, it shall ever be laid by Custome.

Chr Eccl.

Nappers Case.

5. Case.

**N**apper libelled in the Spirituall Court of Wells against divers Parishioners of Tintonholr, in the County of Somerset, for Wythes in kinde. The Defendants plead in the Spirituall Court; a custome that they there have used, to pay a tenth part of the Rent, reserved upon their Leases, &c. And the Judges of the Spirituall Court proceed to examine witnesses to prove this Custome. The said Napper, for that a custome is determinable at the Common Law, and not before a Spirituall Judge, moved for a Prohibition to the Spirituall Court, that they should not proceed to try this Custome before them, and the Court gave vpp till the next Terme to shew cause, &c. and in the mean time to lay the proceedings to examine the said Custome.

Prohibition.

Farmers Case.

Stat. 31. H. 8.  
of discharge of  
payment of  
Tithes.

**T**he Farmer &c. A Prohibition was granted out of this Court into the Spirituall Court upon discharge of the payment of Tythes in the hands of the Abbot, upon the Statute of 31 Hen. 8. and upon issue joined the Cause was tried at the Barre, by a Jury of the County of Northampton, and after full evidence given, the Plaintiffs was Rejected, and a Verdict of Satisfaction awarded; and after the Consultation, the Plaintiffs in this Court pleaded the same Plea, in discharge of payment of Tythes, in the Court Chancery, which was allowed in the Prohibition, which Plea the Spirituall Judge accepted, and proceeded to try the same there, and the Court was moved in the part of the said Farmer the Parson, to have a Prohibition to the Spirituall Judge, that he should not admit of this Plea, which was once tried in this Court, and which merely appertained to the Judges of the Common Law to determine, which was granted by the Court, for the trial at the Common Law, and the Consultation upon it is small in this very Suite, and upon that it well.

Whittingham

Whittingham & Sarah Ux. Vers. Tenants of the Earle of Derby.

Vincent Norrington in Anno 15 Elizabeth recovered in this Court, against the said Earle, as well three hundred pound Debt, as three pound costs, and made Joane Norrington his Executrix, who died before Execution Intestate. The said Sarah took Administration of the goods of the said Vincent by the said Joane administered, and took to Husband Whittingham the now Plaintiff, both which brought a Scir. fac. against the said Tenants upon the said Judgement, and had divers Scir. fac. (upon return in London quod nulli sint Tenentes) into divers Counties by one Testatum viz. into the Counties of Lancaster, Chester, and Northampton, Ret. Cra. Animarum. Anno 16 Jac. Regis, upon the said Writ into the County of Lancaster a Scir. feci is returned against 10 terre Tenants; Et quod non fuerunt plures, who made default, and Judgement was given to have Execution against them. And Execution by Elegit was awarded against them.

Scir. fac.

Upon the said Writ in the County of Chester, it was returned quod Scir. feci to thirty Tenants; Et quod non fuerunt plures Tenentes, ten of these thirty made default, and Judgement is passed against them, and an Elegit awarded against them; the other twenty appeared and pleaded generally, and upon severall Replications Demurrers are joined, entered, and continued, u'que oct. Michael. hoc Termino, upon the third Scir. fac. the Sheriffs of the County of Northampton returned a Scir. feci to the Earle of Bridgewater, and his Countesse Tenants, &c. who appeared and pleaded, and had day to amend their Plea, till this Terme.

Before which time, and before any execution done upon these Writs of Elegit, the said Whittingham the Husband died.

It was moved by Mr. Serjeant Hendon.

First, whether by the death of the Husband, all the whole Writs of Scir. fac. shall not abate, as well against the Tenants, against whom the Judgement is entered, as against them that have pleaded.

The other Question is, whether (admitting that all the Writs shall abate against all) the Plaintiff shall have Execution against any of these Tenants before Judgement be given, for, or against the other. And upon these points the Court will be advised.

Cum avis. call.

Rugles Case.

Bankrupt.

It is a Case of one Rugles of Suffolke, a Bankrupt deceased, referred by the Court upon a trial to Sir Robert Croke, upon bills of the Statute of 13 Elizabeth & 1 Jac. it was resolved by the Court, that if certain Creditors sue a Commission, and others within four months after or more, being Creditors, come before distribution, and will joine in the Charge of the Commission, and all that belongs to it, and tender their parts, that they shall not be refused, but have their equall parts as Creditors. But if any distribution be made of any part of the Estate, no Creditors are to be admitted after that came not in before.

Stat. 13. Eliz. c. (7) & 1 Jac. c. (1) of Bankrupts.

Scarle



Hilar. 17  
7<sup>th</sup> Jac.  
Prohibition.  
Essex.

Searle Ver. Williams.  
Tr. 16 Jac. Rot. 1782.

Clergy for  
Man-slaughter.

Judgement.

**S**AMUEL SEARLE Parson of Haydon German, brings a Prohibition against John Williams, and declares, reciting the Statute of 18 Eliz. of Clergy, where he was Parson, &c. and was indicted, 13 Jac. at Lent Assizes, before me and my brother Haughton for manslaughter, for the death of one Simonds, and convicted for the same. And that the next Assizes in Summer he was allowed his Clergy, but was not burnt in the hand because of his Orders, but by Judgement of the Court was imprisoned, and delivered out of Prison; by force of which Judgement he was purged and acquitted of the Felony: Yet the Defendant pretending him to remain still convicted of the same Felony, and thereby deprived of his said Benefice, and the Church to be void, (which was not so) and that Doctor Donne the Patron had presented him to the same, drew him in Plea, before the Chancelor of London, from whence it was appealed to the Judge of the Admiralty, and from thence before the Judges Delegates, where it being overruled, whereupon he had his prohibition, and yet the Defendant prosecuted after in the Court Christian, whereupon the Defendant demurs in Law, and Judgement was given upon open Argument by all the Judges for the Plaintiff, that he ought not to be questioned now in the Spiritual Court for this manslaughter, as the Case stands, whereof the reason and much of the Clergy at large will appear here.

The benefit of Clergy is a refuge provided by common Law in favour of Learning, to save the life of an offender literate, in certain Cases, though I will not deny, but that it tooks his Writings by occasion of the Canon Law, and in favour of the Church, and was ever ruled, not by any fixed Canon Law, but ordered and qualified by the Kings Courts according to convenience.

At the Common Law at the first, the benefit of Clergy was not allowed but to Clerks in order, secular and religious, as appears by the Statute 25 E. 3. cap. 4. and 4. H. 4. cap. 2. neither did the Common Law require more, 20 E. 2. Coron. 233. Clergy refused, because he had not sufficient habit, and therefore judged to penance. And then if the Ordinary had challenged him, he should have lost his Temporality, and his Franchise of Clergy. Yet the Common Law extended in the Kings Courts to all that could read, as appears 4 H. 7. cap. 11. in favour of learning in general, and in reverence of mankind, and mans blood (which in persons of use was not to be shed lightly: And as they did extend it beyond the Canon Law, so did they straiten it, and deny it in Cases, and Persons, and times, where the Canon Law did grant it as now till Conviction past.

The time of claiming Clergy, could not be till after indictment, and upon arraignment to have a Judge to allow and deliver the offender, as Weston 1. cap. 2. speaks, and so Bracton writ. But yet even then for the credit of the Plaintiff against of Indictors (as the words of the Law are) he was not to be delivered without due purgation. Both which points appears by the said Statute of Westminster. 1. 3. Ed. 1. cap. 2. yet so the practice 2 E. 2. Coron. 417. that if a Clerk were indicted, and prayed by the Ordinary; yet they took an Inquest of Office, and if that found them guilty, he was to be delivered to the Ordinary; but to retain his goods, an intention of Law to get the goods; but as yet the Common Law allowed not the Clerks to be delivered to the Ordinary, after he was convicted by a Jury of life and death, but that obtained allowance by the Statute, 25 E. 3. cap. 4. Pro Clero, which provideth, that though he be convicted for Felony, (even for Treasons, which touch not the King himself or his Royall Majesty) he shall be delivered to the Ordinary.

But yet purgation in that Case, after tryall, was not allowed by the Statute, but an Ordinance promised by the Archbishop (and that in retribution for that

that Grant) for their safe keeping and punishment which was also again ratified by another Statute 4 H. 1. cap. 3. Rast. 9. that Purgation in such Cases should not be allowed, so it seemed; that they made their Ordinances so that persons who were promised before, id est, that they should not be admitted to their Purgation, but kept in prison and punished.

So note you too, that Clergy might be prayed either before or after Judgment on at the first: But now of later times, the Common Law runs another course, to deny Clergy, until the offender were convicted, which it seems they should have; the one to retain their Jurisdiction over the Clergy, which the Clergy laboured to diminish by challenging the prisoner at the first, as was said. The other to bring fastidiers of goods to the King, by the means of the Common Law, that the offender should not pass safely unpunished, but as we get to the life of the Offender. For there are two benefits of Clergy, the one, the saving of the Offenders life, which is a favour merely of the Common Law; the other, that alloweth him to a Clergy of record, and so delivereth him from the severity of the Law. The other to the way of Purgation, which these Ordinances of the Common Law, but is a practice amongst themselves, rather than one to be looked at, then approved by the Common Law, after Conviction, Stanford 1. 7. If Purgation failed, yet he was not restored to the Law, but remained and kept in prison till a Pardon. Now as the Statute of Westm. 1. before mentioned, that giveth way to due Purgation after Judgment, easily said, that if they should that liberty, the King will provide other remedy thereon, I will not say that it shall be so: And I answer, that if there is to be seen by the ordinary way of Justice, and Rule of Courts, so since they could not have the prisoner out by favour of the King and his Council, nor could count his Purgation to the prohibition and irregularity of the proceedings of the Kings Courts, but as the King by his Statutes and Letters did permit the same, it was agreeable to Justice, that the Kings Court should deliver him, abique Purgatione, after the Conviction, because by the true meaning of the Law he ought not to purge in that Case.

And the Court may deliver a Person that is an Attainted Clerk, Abique Purgatione: As their direction and Order is the Rule 10. E. 3. F. Corone 247. opinion of Spiganel.

But yet it is true, that if the Court did deliver them after conviction, without that Clerk they would not be purged then ordinarily after conviction.

This I speak the rather, because it is commonly said in Books, that a Clerk attainted, cannot purge, and so in other Cases which must be understood that in such Cases the Record in the Kings Court is transitor ordinario abique Purgatione; so that is all the Record the Ordinary hath to restrain his Purgation: For, he hath no Record of Attainder, neither to be to take advantage of the Law of the Land, that an Attainted Person is not to purge, and therefore where the Clerk is not, he will purge, attainted or not.

And so on the other side, if the Offender were delivered after conviction, and before the Attainder abique Purgatione (as in facts and apparent they may were and might be, by discretion of Courts) the Purgation was thereby restrained.

These things are to be observed, in the giving and taking of Clergy at the Common Law.

First, that the Court is not to tender it ex officio: but the Clerk that is the Offender is to pray it, as being a favour, and a commuting of the rigour of the Law, yet 22 E. 3. F. Corone 254. says, that if the Judge knows him to be a Clerk, they will not give Judgement, though he pray it not; This is Grace, as though it were a speciall pardon not pleaded.

Secondly, that if the Offender pray it, it is not in the choice of the Judge to deny or grant, but it must be allowed him, where by the Law it is allowable.

Wholly, though many of the Statutes as Westm. 1. and Articuli Cleri cap. 26. 27. Ed. 3. cap. 4. speak of the Ordinaries, demanding of the Clerk and his priviledge, yet a Clerk might pray his priviledge himselfe, and so to the Statute

Statute 18 E. 3. cap. 2. Rastal 5. and the Ordinary could not defeat him of it: neither directly by refusing him, nor indirectly, and by practice, by answering the Court, that he reads not as a Clerke, when he did indeed in judgement of the Court. And therefore the Books 21 E. 4. that sayes that at Newgate one time he refused, was but the opinion of one Judge, and reported of hearsay; ut Audiait. But the Books 9 E. 4. 28. is resolved better, that if the Ordinary refuse him where he is capable, yet he shall not die. And e. Converse, if the Ordinary refuses, and says he reads where he is not capable, yet he shall die.

For the writledge may be granted whether the Ordinary will: or no, and by consequence without him, so that if he will be willfully absent, the Court may both fine him, and proceed without him, for this is an Act that is done in the presence of the Judge, like the Cases of Inspection by the Judge himself, which are absolute, and doe overrule any false Certificate, or Answer, which is made where the Certificate is of things done out of the Court, 21 E. 4. Cotton 147. Resolution of all the Judges. That if an Ordinary refuse a Clerke, yet they shall commit him to the Prison of the Court, as e. Converse. Fitz. N. Br. 66. & 4 El. Dyer 117. & Reg. 69. If the Ordinary be absent the Court may give the Prisoner his Book, and enter his reading, and commit him to the Gaol; and then the Ordinary shall have the Kings Writ to the Justices, commanding them to commit the Gaoler to deliver the prisoner to the Ordinary, which is without any new reading in the presence of the Ordinary, 26 Ass. 29. F. Corone 192. If the Ordinary challenge one that is no Clerke, he shall lose his Temporalities, and yet also, he shall lose the Clerke: for also how shall he be adjudged no Clerke to induce the forfeiture of the Temporalities of the Ordinary.

As regularly the Ordinary ches at the Common Law, had no power over a Clergy man in a crime or offence touching the Crowne, but where that power was given him by the Common Law.

And therefore when the Kings Court did deliver the Defendant to the Ordinary, it did triple a power or permission of the Law that hee, might detain him, to continue or discharge him, according to the forme of their Lawes. But now that this Statute doth forbid the delivery of him to the Ordinary, it reserveth all power to it self, and denies the Ordinaries.

And therefore I am of cleare opinion that if the Ordinary at the Common Law would have contented a Churchman to depose or degrade him for felony, before his triall at the Common Law, that the Prohibition would have lain, for holding a Plea of a Cause of the Crowne, and the presiding the Kings Court, in eodem. Much rather then in the Parsonage of Winchester Case, Co. lib. 2. 23. where a Prohibition was granted, to keep the Priests of a Will for goods, because the same Will also, did give Lands: For, though in truth perhaps the Will be made all uno statu, and included within one continent of writing, yet in effect they are two Wills, and of diverse natures, effects, and consequences, inhereas in the other Case, the crime is all Temporal, idem individuo, and the end of the Conduces is only diversis: That is with no capitall, with them depistation, or degrading, or the like.

And again, if after trial of a Clerke a Felon found guilty or not guilty, they will proceed to prove or disprove any thing against the Verdict and Trial, a Prohibition would likewise lie, except onely in this one Case of Purgation after conviction, performed according to due form, as the Statute W. 1. speaks, which the Common Law did tolerate. As if a Clerke were found not guilty of Felony, and so discharged, if they would after content him again, and admit new proofe that he were guilty, to depose him, they were to bee prohibited: or if upon a Clerk attaint delivered, absque Purgatione, to the Ordinary, they would admit him to his Purgation a Prohibition would lie, yet, and a Premunire too, rather then by a Plea of Lands holden by them, which is not so highly a Plea of the Crowne as criminall Causes are. As among criminall Causes, there are degrees and Reasons, and even some against the Kings own Person and Majesty, as the Statute of 25 Ed. 2. cap. 4. before speaks. Also if they would proceed betwene

Constitution



Conviction and Clergy. Prohibition would lie for prevention, because the Cause is not finished in the Kings Court, otherwise it would be where Clergy is not allowed.

But if they would not controvert nor re-examine the Acts of the Kings Courts, but build their Sentences upon them, they were not to be prohibited. As if they should depose a man by Sentence, because he was convicted by attainder of Felony, Murder, or Man-Slaughter, at the Common Law.

But if they took him at the Kings Court as a Clerke, and hee were in case that hee might purge, as being onely convicted, and the Purgation not restrained by the Kings Courts, they could not deny him the way of Purgation; for in that Case, there was a Writ to command it, upon which if hee were purged, they could no further question him, because by their Law hee was now cleared.

But if that Jury found him guilty, then they might proceed against him as guilty by their Law, and not protected by ours, for though hee had power and possibility of Purgation, yet that did not conclude Purgation Absolut. And the Booke 38 E. 3. is not against this for it brings the judgement of the crime there to the Kings Court incidently. As in the Quire Impedit, where the Bishop refuseth a Clerke for a Temporal crime. But a sentence of deprivation in the Ecclesiasticall Court for a Temporal crime, keeps the whole cause in the Spiritual Court, and so determines of the Capital crime, though not Capitally, whereby they judge both of the nature of the Crime, and the validity of the proofes, neither of which belong unto them. So that Case stands with my Rules.

Now the Law standing thus, that the Clerke as well out of Orders as in Orders, paying his Booke after conviction (as the Law holds is used) had two benefits; the one to avoide Judgement and to save his life, the other to make a kind of formall Purgation of the Crime. The first of these was a just and direct favour granted unto him by the Common Law of the Land. The other was a custome established, by colour of the Common Law among Ecclesiasticall persons in their Courts, which the Statute of Common Law, did rather wink at then approve.

Now comes the Statute 18 Eliz. cap. 7. The Title whereof for this part is an Oyer for delivery of Clerkes convicted without Purgation, and then recites that for absorbing of sundry perjuries and other abuses in and about Clerkes could; Be it enacted, &c. That every person that shall have the benefit of his Clergy, shall not thereupon be delivered to the ordinary as hath been accustomed, but after such Clergy allowed, and burning in the hand according to the Statute, &c. shall forthwith be enlarged by the Justice, &c. And be it enacted that the Justice before whom such allowance is had, shall and may for the further correction of these persons, detain and keep them in Prison for such convenient time, as they shall thinke convenient, so as the same exceed not one yeares imprisonment. Provided that such Clerkes shall be put to answer all such Felonies, as meaning that hee should never be questioned again for this.

So by this Statute two things are wrought. First life is preserved, which is the proper Act of the Common Law.

The other, the Purgation, which was the usurpation upon the Common Law, is utterly abolished, whereby the Statute saith truly, that sundry perjuries and other abuses were absorbed.

The Perjuries indeed were sundry: One in the Witnesses, and compurgators; another in the Jury, compounded of Clerkes and Laymen. And of the third, the Judge himself was not clear, all turning the solemn trial of Truth by Oath, into a Ceremonious and formall lye.

The sundry abuses the Statute speaks of, were first, the dishonour and derogation of the Law of the Land, and the Kings Court, yea, and to the State and Government it self, all which were deluded by this mistake; all which nourished that pernicious error and schisme of State, That Clerkes were not subject unto

the Kings Courts of Lawes; Another that by a counterfeit Verdict, De credulitate, they did frustrate both the Jury of Indictors De credulitate, and the Jury of Triers, De scientia & mera veritate.

So the Statute 18 doth expressly abolish the Purgation, which being now only after Conviction, could not be freed from these Perjuries and abuses meant by the Law, and the meanes whereby the Statute doth abolish it, is by denying the delivery of the Clerks convict to the Ordinary, so; by that, the Purgation must needs cease, which never was nor could be but before those Judges, and in their Courts.

But now this Statute taking away Purgation, never meant to abate or abridge the benefit of Clergy, but to give it by the proper meanes, and in the proper place, and by a more ready and direct meanes without circuit or delay.

And therefore it said first, that they shall be admitted and allowed to have the benefit and priviledge of Clergy, that is the generall priviledge of the Law. And the manner how followes, Negative, how it shall not be; Affirmative, how it shall be. That is, he shall not be delivered to the Ordinary, an unjust Judge to make his Purgation, an undue and unseverable meanes how to make it, but shall be forthwith enlarged and delivered out of the Prison by the Justices, that granted the Clergy the proper Judges in Court.

Now since this Statute hath taken away all power from the Ordinary in Case of Clerks convict, and hath retained all to it self, to whom it did Originally belong; this Court shall now finally determine the Cause, and shall leave nothing to be further done in it, in any other Court. And therefore it saith, that he shall have the benefit of Clergy, his life shall be saved, and he shall be enlarged and delivered out of Prison; that is, freed a poena, and by consequence a culpa; and then provides, that because some offenders may be so enormous that may deserve some further punishment, it gives a latitude of power to the Judges, to continue by their discretion the offender in Prison so; his farther correction, so that it be not above one whole yeare.

And so it appears plainly, that the Statute hath prescribed both the true discharge of the offender regularly, and the height of correction the highest offence capable of Clergy can be subject unto.

Now then the last question is, In what manner the Statute works this discharge and freeing of a Clerke, a poena & culpa, whether by supply of Purgation as it was at the Common Law; or by a kind of Statute pardon.

I say, not by a supply of Purgation, so; divers reasons:

First, all Clerks delivered to the Ordinary, were not receivable nor capable of Purgation, as those that were delivered absque Purgatione as by the discretion of the Court, enormous offenders, Clerks attaint and the like were.

Though they were capable of Purgation, they were not to be purged, so; the Jury had power over them.

This were more to discredit the Oath of the Law then before; so; then Jury went against Jury a kind of equality of trials pro & contra, and with them, there being some Clergy men of higher esteem and faith: But this were to saddle our Juries without any equivalent opposer and in their own Court, and by the same Law, which is oppositum in objecto.

Where they complained of abuses in Purgation of Clerks which were abolished, this were no less abuse then the former though without Perjury.

There was never Purgation in this Case by Common Law.

Therefore the Statute never warrants to do that the Law never did, nor allowed; therefore I hold it workes by way of pardon, which affirms and doth not disaffirme the Verdict.

If you say there is no word in the Statute of Pardon, I say, that there is much less either word or meaning of Purgation, yet Heltons Case 41 Eliz. cited in Foxleyes Case, Co. lib. 5. 110. allows the Statute to work both in Nature, and in Effect of a Purgation; and also of a Pardon by good constructions of Law.

Now

Now (as I have said) there was no reason to intend the Statute of Purgation; so if it amount to a Pardon, that alone is so sufficient, as there is no need of a Purgation or the effect of it.

Neither is it the work of Common Law to purge the offence that the Law hath found and established, and so destroy their own work; but to pardon is natural being an Act of Common Law for an offence at the Common Law, and affirms the Verdict and disaffirms it not as the Purgation doth. So that to take it for both is to imply contradictions.

Now the Exposition of the Statute belongs to the Kings Court of Law, as it is said in *Burtons Case*, Co. lib. 6. 13. A Parson was deprived for Adultery, afterwards a general Pardon came, which pardoned the Adultery. It was judged that the Parson ipso facto was restored to his Benefice without suite in the Ecclesiastical Court, because the judgement of this Pardon, and the force of it belongs to the Temporal Court and not to theirs.

Now the words of the Act do apparently prove, that the meaning of the Statute was to free the Clarke from burning in the hand, and from all further punishment; and therefore mentions that he shall have the privilege and benefit of his Clergy, which imports that he shall have as much benefit as by his Clergy he should have had, which is saving his life and freeing from the crime or in pluribus it was.

But next that he shall not have it by means of the Ordinary and by the way that had been accustomed, but only and immediately by the Judges; and that by the way of a present discharge shall forthwith be enlarged and delivered by the Justices.

And because the party should be understood to be absolutely freed and discharged, the Statute takes from the Judges all power of further punishment, but by the mild word of Correction gives them power to retain them in Prison one year and no more. And the Statute provides that the Clerks shall answer all other Felonies as fearing least the general and free discharge should be taken to extend to all Felonies: But to this they meant not that he should be any way put to further answer.

Now this Ordinance working the effect of a Pardon must needs be understood a Pardon, though the words be not so verbally, like unto the Case upon the Statute *De donis conditionalibus* which does not make an estate in Fee by direct words: but whereas the estate that is now judged Fee simple was a Fee simple and Alienable, post prolem suscitam, &c. It ordains that the Donor shall have no power to Aliene, but it shall come to the Issue or return to the Donor; if the Issue fails. So this is a Perpetuity of a Pardon in effect as Br. Corone 104. Stat. 6. R. 2. If a Will be revoked, the Husband shall have the suits to have the Offender convicted of life, and Member; this makes it Felony. 5 H. 4. cutting off Tongues incorses pain of Felony. This makes it Felony, *Charta de Foresta*, No man shall lose life or Member for killing of the Kings Deers, it is by that made no Felony. But note the Stat. of Hony that gives for hanging in of Hony rounded or counterfeit, forfeiture of the body of the Offender; this makes no Felony but imports only perpetuall imprisonment, that is the liberty and as it were the use of his body. For Felonies and capital crimes shall never be made by doubtful and ambiguous words: And upon the like reason I hold that the 5 R. 2. cap. What for exporting of money gives forfeiture of as much as the Offender may forfeit, that such general words will not make a Felony for which the Offender shall lose his life, but he shall forfeit his lands, against himself and his heirs, not against his heirs Intails, nor his Wives Dowry. And as cessante causa cessat effectus, so there are some effects so incident that if they are not found, you may affirm that there is no cause which must produce such an effect. For though heat makes no fire, yet you may affirm that there is no fire where there is no heat.

And take the Law to have none other effect but to set him at large, and to leave him still as a Felon convicted, enlarged, then could he not acquire goods as by the judgement he may. And





Slade Vers. Drake.  
Mich. 15 Jac. Rot. 2438.

Prohibition:

**R**oger Slade brings a Prohibition against John Drake Esquire; Rector of the Rectory of Axminster, and declares that whereas Richard Gill, late Abbot of the Monastery of Newham, in the County of Devon, was seised of a messuages and others Lands, Meadows and Pastures, parcel of the Possessions of that Monastery, to the time of the dissolution in 1536. And whereas also the same Abbot by himselfe, and his Farmers at the time of the same dissolution did hold and injoy the same acquitted and discharged of all manner of Exchequer and to seise surrendered the same 30 H. 8. and then recites the Clause of discharge of Exchequer in the Statute, 31 H. 8. and then brings down the Land by descent to Quene Elizabeth; and from her to the Duke of Norfolk, and from him to the Lord William Howard: And that he by Inventors intitled in the Chancery, within sixe Moneths, did bargain and sell the same unto the Lord Peter and his Sonne 3 Jac. and they demised it unto Slade the Plaintiffe, and then Drake the Defendant, did sue him in the Consistory Court of the Bishop of Exeter for Exchequer and other Exchequer against the form of the said Statute.

Devon  
Drake.

Whereupon the Defendant demures in Law generally, and prays a Constitution.

Judgement:

Upon this Case after solempne Argument judgement was given for the Defendant, and a Constitution awarded, Warborton dissenting.

In the Argument of this Case, I made two great points.

1

The first, whether the Declaration were good or no, and I held it not good.

The second, whether the fault of Declaration were in the substance, so that advantage might be taken of it upon a generall demurre: And I held the fault substantiall, I first protested if my judgement should take Counsel of my interest or affection, I should be of another minde, but I was bound within the Rules of Justice, Presidents, Religion and Prudence. Justice, summius iudex, Prudence, Præsumptio est iniquitas. Religion, Merito summi habetur ratio, que pro Religione facit. Prudence, Quod dubitas ne feceris. De non apparentibus & non existentibus eadem est ratio.

### Now to the first Point.

**L**itleton says, that Pleading is the most honourable, commendable and profitable part of Law, and by good desert is it so. For Causes arise by chance, and are many times intricate, confused and obscured, and are cast into forme, and made evident, cleare and easie, both to Judge, and Jury (which are the Arbitrators of all Causes) by good and late pleading. So that this is the principall Act of Law, for Pleading is not talking; and therefore it is required that Pleading be true, that is the goodnesse and vertue of Pleading: and that it be certain and single, and that is the beauty and grace of Pleading.

Therefore the Law forbiddeth double Pleading, and negatibo Pregnant though they be true, because they doe ingeigne and not settle the Judgement upon one point.

The Law  
loves single  
pleading, ab-  
hors double.

Therefore first generall Pleading is disallowed though it be in matters of Fact, as a Covenant to make Grants by the advice of J. S. he must shew what advice he gave. 26 H. 8. 1. 16 E. 4. 9.

Condition that the Oblige shall enjoy an Office according to a Grant of Letters Patents, he must not pleade in hæc verba, but he must shew the effect of the Letters Patents and the enjoying accordingly.

But because it hath been said this is a spirituall Act (which yet I grant not to be so,) he that pleads deposition of an Abbot, he shall plead before what Ordinary. 9 E. 4. 24.

no debt upon Lease of a Vicarage, the Defendant pleading a Sequestration must shew by what Ordinary, for what Cause, as for Non-Residence or the like, and legall process of sequestration, 5 B. 4. 29.

So union of Chappell must bee shewed; by whom? Scilicet. The Pope or Bishopp, not generally, Concurrentibus in, &c. 11 H. 7. 8.

In pleading a Divorce, you must shew before whom it was, and for what cause of Divorce, 11 H. 7. 27. but all the proceedings you shall not need, as you shew of a Rascall at the Common Law, 21 E. 4. And therefore in Specios Case, C. 1. 5. 27. the Bishop cannot plead cause of excommunication, Schismaticus in excommunication: nor upon the Statute 4 H. 4. that a man was defamed of Hereticke. But they must specify the Articles as Hereticke though they be matters of mere spiritual Cognizance. Vide Dyer 8 B. 1. 254. Quarter of Taverners, Blaper of unlawful games, &c. ob alia diversa crimina criminofus.

For this is regular by difference between the Kings Courts and the Courts Ecclesiasticall; that though a spiritual Cause cannot originally and presently fall into the Kings Court.

As by calling of a man Hereticke he shall not have an Action of the Case, 20 H. 8. yet if a civil Action be well commenced, as in the Exchequer a Quare impedit, or an Action of this imprisonment if any thing fall horizontally, that is spiritual, the Kings Court shall continue the same upon it, either by Jury or Demurrer, except in Cases where the Law hath provided trial by Certificate, as by the Statute upon Beggards Nunques accouple, &c. literature and the like. In which Cases the Bishops are not Judges, but Assistants of the Kings Courts, as other kinds of Trespases are: Whereupon the Court proceeds to Judgment according to their Certificate and Advice. But on the contrary, if a Cause be given well in the spiritual Court, as being spiritual, and a point fall horizontally, that is of Common Law cognizance, it is cleare contrary, for the Trial is called from them as in a bill of excommunication and limits of Parishes in Cities of Wythes.

Now if it be a point of Discharge, that is to be pleaded as this Case is, it must either be pleaded specially, and referred to the Court to the discharge is: For it is no discharge if it be not sufficient, and the sufficiency is matter of Law, and therefore must be seen and judged by the Court. As in 2 E. 4. fol. 40. And Mansels Case, Co. lib. 2. fol. 3.

Now touching the discharging of Tythes themselves, and the pleading of them at the Common Law: It is to be observed, that they are things of common right, and doe of right belong unto the Church. And therefore though it be true, that before the Council of Lateran there were no Parishes nor Parson Bishops that could claim them, but a man might give them to what spiritual Person he would, yet to the Church he must give them. Yet since Parishes were created, they are due to the Parson, (except in spiritual regular Cases) or Vicar of the Parish and therefore when you have a Prohibition of discharge of Tythes, you must consider it is a Plea in barre against Common right to a Demand of Tythes which is a Common right, though they be in severall Courts, as by a Release either in Deed or Law.

Now then if you will discharge a Just Demand, you must satisfy the Court of your discharge: Consider then the kinds of discharge of Tythes, the persons capable of them, and the means both.

The persons or bodies capable of them, are either spiritual or Temporal. Temporal I say when they were Temporal, when the discharge did first best in them, for otherwise if the Temporal man succeeds a spiritual body in discharge, as upon the Statute 21 H. 8. it is to be reckoned in a spiritual person or body, not in Temporal.

The spiritual persons had foure ordinary waies of discharge, that is, First Bull of the Pope: Secondly, Composition: Thirdly, Prescription, and these were absolute.

Fourthly, Order, and that was limited so long as Land remained in the Vicarance



porance of the Religious persons themselves; and these were the Cisterciens, the Templars, and the Hospitallers, or Jerusalemite: But unity of possession of the Parsonage appropriate, and the land tithable was no discharge, nor so holden at the Common Law; But how that came into use and upon what reasons and with what cautions, and how deduced in pleading, I shall speake after when I come to the Statute of 31 H. 8.

Now clearly at the Common Law, the spirituall person could not claime his discharge by Bull, composition or order; but he must plead it with his ground and reason, specially: But his discharge by prescription was allowed him without any other reason, because he was a person capable of such discharge. And so the originall was probable, and therefore the prescription was allowed him as in other cases immemoriall whereof the originall cannot be found, but is establisht by long possession just.

Now temporall persons, (not so speaks of the King which was a speciall Case 22 Afflics) had two wayes to obtain Tythes, or to discharge Tythes: The first was by grant of the Parson, Patron, or Ordinary, the other was by a prescription; but that was eider, not prescriptio simplex, but composita, not a prescription single but compounded, differing from the case of the spirituall persons. And so is Piggots and Herons case.

And so are the Common cases: where men have the discharge of Tythes in kind by paying composition for them in money or land as persons holding enfeoffed by Parsons and Vicars in lieu of them, 8 E. 4. F. N. B. sec. 100.

But now note a strange Anomalum in this case Tythes differing from all other cases in Law.

For whereas prescription and antiquity of time testifies all other titles and supposeth the best beginning that Law can give them: In this case it brings cleane contrary. For whereas a grant of a Parson, Patron, and Ordinary is good of it selfe without any recompence or consideration, when it runneth out to prescription it dyes and perishes; Whereof no other reason is given but that our Bookes say that a man may prescribe in Modo, decimandi but not in non decimando; And this is in Favorem Ecclesie, lest lay men should spoyle the Church.

But I will make another reason not dissimilant from Law.

There are prescriptions of Law so violent, as though they be false, a man should not be received to aver againe them, as in a Precipe. The tenant pleaded himselfe villain to I. S. and that he hath nothing but his Willenage, the Demandant had no reply though it were false, but his writt must needs abate till the Statute 37 E. 3. did admit the Counterplea; Mansels case 21 E. 7. So in Replevin upon Abowry the tenant disclaimes, he shall have judgment, though it be false, for the Law helieves, that these parties will not doe themselves wrong in so high a degree.

The like reason moves in this case: the Law presumes violently that a lay man cannot be absolutely discharged of Tythes: And therefore will not allow a prescription of such discharge, holding it more reasonable that some one man should suffer a mischief to lose such a privilege, being so improbable and of so dangerous consequence, then for his particular to admit a spoyle of the Church and a decay of Religion, according to the Rule, Omne Magnum exemplum aliquid habet ex iniquo quod publica utilitate compensatur.

So though you shall be allowed your discharge by grant when it appeares, yet when it appeares not, stabitur presumptioni donec probetur in contrarium.

Now the Common Law as touching the discharge of Tythes and the formes of pleading of it standing thus: The next question is what change the Stat. of 31 H. 8. of sponasteries hath made in that behalf.

And I am of opinion that it hath made two maine changes.

The first, That it hath by force of the clause of discharge passed and continued certaine discharges that were before the Stat. that is by Bull, composition and order, and conveyed them over to the King and lay persons, which els would have vanished and dissolved with the spirituall bodies themselves in whom they were annexed.

The next is, That it hath created and made one new discharge which was not before at the Common Law, that is, the unity of the possession of the Parsonage and the Land Tythable in one hand.

And this was long controverted and now is a received opinion, by the determination of the Kings Courts to be de lege, a discharge within the meaning of the Law, as the Doctors say that Articles are made de fide by the determination of the Church.

But in this case of unity, four things are to be observed.

First, That it is no discharge of Tythes (but as it is well observed) a discharge of the payment of Tythes, and therefore if it be pleaded by way of discharge generally, and the Jury find nothing but a perpetual unity, it is found against the pleader, and so much is agreed in Priddle and Nappers case.

It is no discharge except it be by prescription.

It is not perpetual, yet if it be alleged that the Abbot & his Farmer paid Tythes, that doth destroy the prescription, because that proves that there was no real discharge, but a non payment by unity only; Yet an unity by prescription is good prima facie, but not of it self, but in contemplation of a perfect discharge, that shall be supposed though it cannot be found so; the infinitesimale and impossibility of search of things beyond memory.

Lastly, though unity perpetual be allowed, yet it is not well pleaded except you add that ratione inde they held discharged of payment of Tythes time out of minds, so; though the unity shall be traversed, and not that conclusion or consequent, yet that conclusion stretch it to the Stat. and Answers the real and perfect discharge that is presumed under the unity, to which the unity it self is but augmentative; but yet I am of opinion it is but a fault in forme, which will be cured by a verdict of general demurrer.

This discharge by unity being the onely discharge that is created and made of now by this Statute, all other discharges are not otherwise preserved but by these words, That the King, his heires and successors, and such persons their Heires and Assignes, which shall have and hold them according to their estates, and titles discharged, and acquitted of payment of tythes as freely and in as large and ample manner as the said Abbot had & held the same at the day of the dissolution of the same.

So first it is plaine that this clause giveth neither new discharges nor enlarged the old, but continued and boundeth them within the limits of those that were enjoyed by the Abbot both by word and meaning according to the cases Touchard, &c. For, though unity (as hath bin said) be now used so; a discharge, yet it is not so; for it self but so; a more perfect, which is presumed though it appears not.

Now this being the substance and body of this clause in word and meaning, It is strange it should be moved, that out of this clause may be drawn a concept of a libertie given to the possessors of Abbey lands to plead their discharges in other forme, and with more generality and favour, then the Abbots themselves had in those cases: Against which the reasons are many.

First, the word is expressly touching the having and holding of them, not a touch nor a glance of the pleading of them, which is merely heterogeneum.

Secondly, If these words should be extended to pleading it would tend expressly against them, so; then it must be understood, that they shall have the benefit of pleading, in as large and ample manner as the Abbot had. Which implies a negative. That it shall be in no other nor larger manner, for the Rule is, That affirmatives in Statutes that introduce new lawes, doe imply a negative of all that is not in the Statute.

And therefore in Amy Townsends case Plow. 111. it is adjudged as it hath bin since, that where one comes to a possession by a use out of a State discontinued, so that the entry was not lawfull to the Cestui que use such a possession workes no Remitter, because the Stat. appoints the possession in the same manner and forme; (which imports a negative, and no other) as art in use.

So the Statute Westm. 1. appoints that the Demandant in a quod ei deserviat may vouch as li esset tenens, if in the first Action he could not vouch, as if it were a Scir. fac. then cannot he vouch in the Quod ei deserviat, being Demandant, 14 H. 7. 18.

Wherof, if you shall admit this Exposition upon this Clause you must admit it also upon the body of the Law, upon the like words, which are thus: The King shall have and hold, to Him, his Heires and Successors, all Monasteries, and all their Lands, Tenements, Rents, and in as large and ample manner as the Abbots had the same, at the time of the dissolution: so that it shall suffice to plead that the Abbot was seized of a Rent charge out of my Land at the time of the dissolution, &c. without shewing any other Title: And so of other Statutes, and this kinde of pleading hath the same pretence of Issue of Writings, of Grants, of Rents, Reversions, and the like, and in strictness of search and moze then the Case of Bulls and the like.

4 This forme of pleading that lies so open and obblis in words of the Stat. and was so easie and pleasing to them that sought discharge, towe never to this day amongst so many busie wits ever offered, in any Authentick pleading, much lesse received the least allowance, by the opinion of any learned or grave man, but the contrary by the specification of the discharges, except in the Case of prescription: And yet in the case of Unity, though it be by prescription, it is also specified.

5 Lastly, this were to take a Statute contrary to the Common Law, which trusted not Laymen with their Prescriptions, and yet now possibill trass them without Prescription, with that that belongs to the Court to Judge: And this is against a main Rule in expounding Statutes, especially in Offices.

So no man but can see what absurdities would follow by admitting a change of Regular formes of pleading to vulgar speech used in Acts of Parliament, to expresse the meanings which are every day by the Judges extended, &c. Statutes, and changed, according to a better Rule of Reason and Justice, then the words beare. And if the words rule not in substance, much lesse in the forme of Pleading, which is the Act of Law, as hath been said: And this prejudice of Irregularity of Pleading, is as ill in consequence as the principall.

So the Statute of 4 H. 4 of Heresies before mentioned, was not pleaded as the Statute went in generall, but the Heresie specially assigned.

Now take the Statute 34 H. 8. cap. 20. that provides, that if the Tenant in Tails of the gift and provision of the King, suffer a common Recovery the Reversion or Remainder then being in the King, that such Recovery shall not binde the Heires in Tails, but that they may enter after the death of the Tenant in Tails: will any man say that the Heire may plead, that his Ancestoy was Tenant in Tails of the Kings provision and Reversion or Remainder in the Crowne, when he suffered the Recovery.

So in the Case of 11 H. 7. c. 20. if any woman (being Tenant in tail of the gift of any the Ancestors of the Husband) discontinued, the same shall be void, and that it shall be lawfull to the person to whom the interest after the death of the woman shall appertain to enter: will any man say that it were well pleaded in these words, without shewing how the State grew, or how the discontinuance was made, and yet he that is to take the benefit, may be a stranger to the conveyance, as upon a Covenant to raise the use.

So upon the Statute 32 H. 8. of conditions, These are no mischiefs to the discharges that were before time of memory of all sorts: For, they must be maintained and pleaded by prescription, even Unity it selfe may be so. Neither is there any mischief in effect to those discharges, which were created since memory, if they be true, and the Originall unknown, for they may be both supposed and pleaded by prescription: For they had their effect of discharge, and the prescription cannot be impeached, but by shewing a late Originall of such discharge, which if the Adversary can shew, the Party himselfe may much better: So then there remains no prejudice but in one Case, where there can be no reasonable presumption of a lawfull discharge, which is where there cannot possibly



be a discharge by prescription, that is where either the Abby was founded, or the Lands purchased to the Abby since memory, in which case to presume a discharge even to the last times, where there is no appearance of it, is as much as to say that all Abbeyes have discharges for all their Lands which may be extended even to others that had discharges thereby for their own parrance, for they might also obtain by Bull or otherwise generall and absolute discharges, and this may be concluded, that if this form of pleading be once received, you shall have all others lost, and this only used, which is one of the weightiest reasons that makes me explode it, considering the bulls writs, that have used all means to win discharges, and for use of pleading to that purpose, and yet never took boldness to offer this, and to what needed all the labour about unity by prescription, or without prescription, if they might have pleaded discharges at the time of the dissolution. For, it is easie to prove a non-payment, by reason of an unity for any time, and non-payment is the Common evidence for the proof of a discharge sufficient, which may be proved when a perpetuall unity cannot be.

Discharge in Abbots must now be proved a posteriori, for no man living can now speak to the time of Abbots. As to the case of Wimbold and Talboys, it is no authority, for the Judges are divided two to two. Secondly, both points pleaded their viz. covin and deceit were matter of fact.

And as to the case of Strata Marcella; that is no authority at all, for no Judge speaks a word to that point, and the judgement passeth against him that pleaded so. But that indeed was upon another reason and point. And as to Cokes opinion in this Case of the Archbishop of Canterbury, lib. 2. 48. I answer, First, that the opinion makes not at all to the judgement of the Case, to say that by the Statute 11, such a discharge may be pleaded.

Next it is no part of the resolution of the Court, but an addition of his own, and that sudden and interposed.

Thirdly, it is so imperfectly set down, that the Plea, &c. so it may be the Plea, and his predecessors.

And that such an Allegation is commonly used in Prohibitions, which argues plainly, that either hee mistooke the practice, or the Booke mistooke him, which I rather believe, which is made the ground of his opinion: For there is no authentickal President, much lesse Judgement or grave opinion to that purpose.

And again that Case and Winchester, in the same booke fol. 44. being both 38 Eliz. Pridleys Case, coming after 10 Jac. in his 11 Booke fol. 44. he makes these questions, that if an Abbey have been time out of mind, and an appropriation since, yet they may prescribe in a generall discharge; for that may be though a writt come after. But saith he, if the Abbey it self were founded since memory, then he cannot prescribe at all in the generall discharge, and so leaves it as a Case desperate, where the Abbey was founded since memory, which yet he might easily have related, if he might plead a discharge time of the dissolution, without shewing how, which is either a retraction or an explanation of his former Report.

Now to that which was well moved and objected by my brother Hutton, that the Plaintiff hath not well conveyed himself to the land charged with Writhe, I hold that the Defendant notwithstanding that defect cannot upon the whole matter have a consultation, if the discharge had been well pleaded: For the Title of the Land is not in question, but whether the Land be discharged or no, which any man that is answerable for the Writhe, may plead whether he have good Title to the Land or no, and since the person in this Case hath sued him for the Writhe, he hath enabled him to make his defence, either by Plea of discharge in the Ecclesiasticall Court, where he needs no title, or by Prohibition to the same effect in the Kings Court, which is in lieu of it, and supposeth that hee offered his Plea there.

And this is regularly true, that if the Prohibition be faulty, yet the Defendant shall never have a Consultation, if it appear to the Court that the suit in the Ecclesiasticall Court was not well founded, as it was there heard, though he might have had a suit in another manner.

And

And therefore M. x. and 2 Eliz. Dyer 170. one Inch for Tythe Corn on 60 Acres of ground, the Defendant in his Prohibition said that all was barren ground, and paid no Tythes, whereupon issue was taken, and the Jury found that thirty Acres were so, and that the other thirty Acres were barren, but yet had paid Tythe Wool and Lamb. The whole Court thought at first a Consultation should be awarded for that part, but yet upon better advisement, they resolved the contrary, for he had no right to pursue his suite for Corn, and by the same reason if the Land be discharged he ought not to sue for the Tythes of it any more, whether he hath Tythe to the Land or no.

I hold the Declaration grossly faulty in another point, that he hath laid no Estate of the discharge of Tythes, for he hath not said that Oath the Abbot took seized of the Land in his demesne, as of Fee discharged of Tythes, but hath made it two sentences, that he was seized of the Land in Fee, at the time of the dissolution discharged of Tythes, which may be true, if it were but for that year by grant of Parson, Patron or Ordinary.

The second great question is, whether the Defendant in this Case ought to have demurred especially, for the Plaintiffs hath laid, that the Land was discharged, which the Defendant by his Demurrer may have seemed to have confessed.

But I am of clear opinion, that the general Demurrer notwithstanding, the Defendant may still take advantage of the fault.

The words of the Statute are, that the Judges shall proceed and give judgment, according as to the very right of the cause and matter in Law shall appear unto them: No right is as no right, if it appear not to the Court, as he ruled in the Case of Heard and Baskerville, that not showing of a Deed, or not producing the Letters Testamentary, or of Administration, or not laying a place of view, is not remedied by General Demurrer.

Mich. 11 Id.  
Rot. 693.  
Deven.

Gawdy Vers. Bishop of Canterbury, & alios.

Hil. 17 Jac. Rot. 1840.

Quare Imped.

Norw. Gulsom

Sir Henry Gawdy Knight, brought a Quare Impedit, against the Archbishop of Canterbury, Sir William Bird Knight and Humphrey Roke Clerk, and declared that Richard Southwell was seized of the Manor of Popenho alias Walfoken Popenho, to which the Abbots of the Church did appertain in Fee, and presented William Masters his Clerk, who was inducted and inducted &c. and so seized 17 Jan. 24 Elizabeth, for money by bargain and sell the Manor ad quod, &c. to Thomas Barow in Fee, and Barow being seized, the Church became void by the death of the said Masters, 2 Feb. 1588. and remained void by 18 months, whereupon Queen Elizabeth in default of Patron, Ordinary, and Metropolitan, did present by Lapse Francis Snell, who was thereupon Admitted, Instituted, and Inducted, and afterwards Barow did for money bargain and sell the Manor ad quod &c. to Richard Gelyn and Diones his wife, and the Heires of Catlyn, who thereof inrolled Sir Henry Gawdy the Plaintiff 12 October 33 Elizabeth, and he so seized, the Church became void by the death of Snell, and so remains void, and so it belongs to the Plaintiff to present &c. The Archbishop claims nothing but as Ordinary, sede vacante of the Bishop of Norwich, and demands Judgement, if without special disturbance, &c. Sir William Bird pleads no disturbance, Humphrey Roke pleads that he is Parson impeding of the presentation of the King, and saith, that long before Southwell had anything in the Manor ad quod, Queen Elizabeth was seized in Fee, as in gross, of the Abbots of the said Church in right of her Crown of England, and she so seized presented the said Francis Snell to the Church then void, who was thereupon Admitted, Instituted, and Inducted, and that the Queen died seized of the Abbots, which descended to the King who being seized the Church became void by the death of Snell. (and thereupon the King 4 Decemb.

Decemb. An. 16. presented the Defendant, who thereupon was admitted, instituted, and inducted; and yet is Incumbent there; absque hoc quod advocatio Ecclesie pred. ad pred. Manerium de Popenho alias Walleken Popenho pertinet, as the Plaintiffs declared, and thereupon at Issue.

The Jury finds that Southwell was seized of the Spanno; with the Abb. appendant and presented the said William Masters, who was thereupon admitted, instituted and inducted, and that Southwell bargained and sold the Spanno; ad quod to Thomas Barow, and that the Church became void by death of Master, Feb. 1588. whereupon the Queens Elizabeth to the Church then void; 1. Feb. eodem Ann. presented Francis Snell by these words, per mortem huiusmodi ultimi Incumbentis ibidem vacant. & ad nostram presentationem iure prerogativa. Corona nostre Anglie. spectant. who upon the said Presentation 16 of the same February was admitted, instituted and inducted by a Letters of Institution, coming per Dominam Regiam veram & indubitatam ut dicitur patronam, and then conferred down the Spanno; ad quod, &c. to the Plaintiffs; and that Snell died, and the King presented Rone the Defendant in these words, ad nostram presentationem sive ex pleno iure, sive per lapsum temporis, sive alio quocunque modo spectant & super totam materiam, refers to the Court whether the Abb. be appendant or not prout, &c. And it was adjudged by the Court that the Abb. remain appendant notwithstanding the Queens presentation of Snell. For it appeared, that there was no colour of Title to the Queen, to present, no lapse; for the presentation, institution &c. were all in the same month, & within the appearance was. And if there had been lapse that had not severed the Abb. son, and usurpation by the Queens it was not, because the presentation imposed a right where none was, and so was void; for the Queen meant to be no wrong; and therefore this case is stronger than Greener case, where the presentation is by lapse, and the Title is by other right. And therefore I find that this presentation of Rones, was upon the same reason void, & therefore an usurpation by the King must not report any right, but present to the Church being void generally, and require Admission, &c. Now then the Presentation of Snell being void, it was but a collation of the Bishop which makes no disparagement; so much as plenarty, but the Church remains void, as Greener case saith, which is to be well understood, that it makes no binding plenarty against the true Patron, but that he may not only bring his Quare Impediri, when he will, but also present upon him when yeares after. And if the Bishop recites his Clerke the other is out ipso facto, yet to all others he is a full Incumbent, (and not in the name of a Curate onely) and shall sue for Tythes, and is capable of a Confirmation from the King, as the Words be 1. H. 4. c. 1. and Plowden in Greendons Case 498. And therefore the chief Justice was of opinion, that if the Patron brought a Quare Impediri upon it he must be named, or else he could not be removed, and also that such a plenarty did barre the title of the Metropolitan and King.

Holland Vers. Shelley & alios.

Mich. 17. Jac. Rot. 27. 10.

Suffex  
Waller.

Sir Thomas Holland brought a Quare Impediri against Sir John Shelley Knight, the Bishop of Chichester, now Bishop of Norwich and Laurence Gibson Clerke for the Benefice of Clapham, and Declared that King Edward the fourth, the seventh of December, Anno Regni sui (8.) did grant unto John Mowbray then Duke of Norfolk, by his Letters Patents, in these words, Quod ipse, Heredes & Assignati sui habebunt omnia & omnia bona & Cetera quoruncunque felonum de, aut pro quacunque feloniam in aliquibus sive quibuscunque Curia aut quacunque Curia dicti Domini Regis, heredum sive successorum suorum, aut aliquorum qualitercunque convictor & convincend. damnator & damnandor fugitivorum & quoruncunque ut legat, & ut legand. warrar, & warrand.

omnium



omnium & singulorum pro felonis in exigend. qualitercunque possit. & ponend. ac omnia bona & catalla quaecunque eidem nuper Regi, Hered. & Succ. suis, quocunque modo ut predictum est forisfac. & forisfaciend. sive confiscat. & confiscand. infra ripam ipsius Ducis nuper de Bramber in prae. & com. Suffex & praeinect. ejusdem Raps quoquo modo invent. & inveniend. existent & extunc fore contingent. And then conveys these liberties to himselfe for peares, and the Advowson to Sir John Shelly who granted unto Thomas Shelly the next Advowance, who was outlawed for debt, and the Church became void, and so it belonged to him to present, and averred, that the Church lay within the Rape of Bramber, upon which Declaration, Sir John Shelly confessed the Action, and the Bishop demurred in Law, his Council conceiving that the grant of liberties did extend onely to the goods and Chattels of persons outlawed only for Felony, because the Clause concerning Outlaws was in the middle between the Clauses of forisfaciend. for Felony, and urged the Case of 8 Hen. 4. and 1 Hen. 6. of grants of goods of Felons, Ita quod si pro aliqua transgressionem aut alio delicto pro quo catalla perdero debent, &c.

But the Court resolved, that the Clause did extend to Outlaws for Wrongs, and Trespasses; For Outlaws for Felony, were contained under the first Clause of Felons convicted, or condemned; And Felons losing goods by flight either in deed or Law are contained under the words fugitivorum & in exigend. possitorum.

So the middle Clause, of utlag. which stands perfect of it selfe and without depending upon the other, though it be amongst them, must either be construed of Outlaws in Actions, or else must be surplusage, and of no use.

Also being a grant of a lower nature, it is still placed, but the Cases put by the Counsell of the Defendants, are nothing like, for the very Grants are only Goods and Chattels of Felons, which the Clause following under the ita quod, cannot enlarge, and withall, Transgressio est nomen equivocum, and being joined with Delictum, shall not be taken for a Common trespass, but for an offence.

Secondly, it was resolved, that the Deed of grant of the next Advowance to Shelly, was not to be shewed by the Plaintiffs, being in the post, and not pish to the grant in any wise.

Thirdly, it was resolved, that the Advowson had such a locality in the Rape, where the Church was, that it accrued to the Plaintiffs, wherefore the Deed of grant was, of the Grantor himselfe were at the time of the Outlawry.

In this Case Gibsonus Parson of the presentation of Sir John Shelly, pleaded another Plea, which was insufficient and judged against him. So the Plaintiffs had a Writ to the Bishop against them all.

### John London against the Chapter of the Collegiate Church of the blessed Virgin Mary of Southwell.

M. 16 Jac. Rot. 1877.

Quare Imped.  
Nottingham  
Waller.

By what words  
in a Lease, an  
Advowson will  
not passe.

John London brought a Quare Imped. against the Chapter of the Collegiate Church of the blessed Virgin Mary of Southwell of the Vicarage of Southwell, and declared that one Jones was seised of the Prebend of Normanton, in the same Collegiate Church, to which the Advowson of the said Vicarage did, and both belong in Fee, and presented, &c. And then brings down the Prebend unto Robert Abbot Clarke, and then shewes, that Abbot did demise the Prebend ad quarr. to him for peares yet enduring, and that the Church became void, and the Chapter of Southwell disturbed him.

The Chapter pleaded that Robert Abbot did not demise the Prebend unto the Plaintiffs modo & forma prout &c.

The Jury find, that Abbot made him two Leases of one Date, of divers several parcels of the said Prebend, with these generall words, In the conclusion of one of the leases, cum omnibus commoditatibus, emolumentis, profitibus & advantage cum pertinentiis eidem Prebend. spectant, seu aliquo modo pertinent.

And

And then concludes, That if the Abbotsdon or the Vicarage passe by this lease, that then Abbot did demise the Prebend &c. and if not, then e contra, which was a conclusion somewhat imperfect, yet serbed well enough. The court adjudged that the abbotsdon did not passe by the Lease aforesaid, and the said words. The words are four; Commodities, Emolments, Profits, and Advantages, to the Prebend belonging; all which four words are of one sense and nature, implying things gainfull, which is contrary to the nature of an Abbotsdon regularly, yet an Abbotsdon may be posided in value upon a voucher, and may be Assets in the hand of an executor. But words in grants shall be construed according to a reasonable and easie sense, not strained to things unlikely and unuall, and therefore 14 Hen. 8. 1. If a man grant all his Woods and Trees, Apple Trees will not passe. And 20 Ass. 9. common in grose will not passe by the words Terras Tenements past, & passur. yet it is a feeding and pasture, and 44 E. 3. 33. an Appropriation, was the Abbotsdon of it, will not passe by the name of an Abbotsdon, yet an Abbotsdon will bee contained under the name of a Tenement. And therefore 33 E. 3. the King gave licence to purchase Lands and Tenements in Mortmaine to the value of an hundred shillings allotted for Abbotsdons, and the Office is de placito tenet. And 15 Eliz. Dyer. 322. Abbotsdon passed by name of all hereditaments lying where the Church lies, but the words here, commodities ec. it is to be understood of those things whose nature is gainfull and commodious, as Commons of feed, Cows and the like, that belong to land, and make it more profitable and commodious; and therefore 39 Hen. 6. the King granted that Penkes should have all their possessions of the Abbey in the vacation for their sustentation, Rules, that they should not have the Abbotsdons because no sustentation arose from them.

Lamb Vers. Thompson.

Mich. 16 Jac. Rot. 2342.

Mich. 18. 1st.  
Oblig.  
Suffolk.

Edmond Lamb brought an action of Debt against Richard Thompson, upon an obligation of forty pounds, the condition was, that if the said Richard Thompson should not any time or times, after the making of the said Obligation be any way or meanes, aiding or assisting unto Thomas Elmy, or any other person or persons for him the said Thomas Elmy, in any action or actions, suits, vexations, troubles, hinderances, or molestations, to be commenced or prosecuted against the said Edmond Lamb his wife, children and assigns, that then this Obligation shall be void.

The Plaintiffe by replication assigns for breach, that he brought an action of trespass before that Obligation against the said Elmy and the Defendant Thompson, and that he had judgement upon it for eight pound damages against Elmy, and two pence damages against the Defendant and eight pound costs against them both, and that thereupon after the making of the Obligation, Elmy and the Defendant brought a Writ of error, and so hindered him of the execution upon his judgement, whereupon the Defendant demurred, and it was judged for him that it was no breach, for though the Defendant might binde himselfe not to bring a writ of error expressly, yet upon such generall words as these are, whereupon the Law may make construction, it shall never enforce it so, for the apparent sense of the Condition is, That he should not maintain Elmy in any his proper suits against the Plaintiffe, which is just and reasonable, but it hath no reason, that he should be barred to defend himselfe by joining with Elmy against unjust proceedings of the Plaintiffe against him; And therefore if the Plaintiffe after verdict against Elmy and the Defendant, should have release, and yet have taken judgement and execution, the Defendant might have joyned with Elmy in an Audita Querela, for it is his owne defence against an unjust suit, and so is this Writ of Error.

## Poland Vers. Mason.

Hil. 17 Jac. Rot. 1938.

Case.

Parolls.

I charge him  
with Felony.

POLAND brought an Action of the Case against Mason, for saying I charge him (meaning the Plaintiff) with Felony, for taking money out of the pocket of Henry Stacy; upon not guilty, the verdict was found for the Plaintiff, yet the judgement was given against him. The reason was double; he doth not affirm that he is a Felon, but he doth only say, that he doth charge him with Felony, which he may lawfully do in some case, though he do not the fact, as if a Felony were done, and the common fame were that hee did it, any one that suspects him may charge him with it: the other reason was because those words single doe but suppose it: Felony, and that whereby hee would warrant the words is laid downe, which for ought appeareth to the Court might be but a trespass, and though hee chargeth it to be a Felony, yet in Ambiguities the Court shall follow the mildest sense, as in the Case, hee is a Thief, for he hath stolen my Trees: yet there is a stealth both in the words, and in the reason of the words.

## Powel Vers. Wind.

POWEL an Attorney brought an action upon the case against Wind for these words, I have matter enough against him, for D. Hartley hath found forgery against him, and can prove it against him. And it was judged against him, for there was no certainty wherof the forgery was.

Hartley hath  
found forgery  
against him  
&c.

## Strede Vers. Hartley.

Tr. 18 Jac. Rot. 399.

Replevin.

STREDE brought a Replevin against Hartley for taking a distresse at Baildon, in a place there called Steed-house. The Defendant made constant as Bailiffe unto William Hawkesworth, because that house was holden of him as of his Manor of Baildon, the Plaintiff saith that it was out of his Fee. The Verdict upon Issue was, and the Ven. Fac. was de vicineto de Baildon, and after Verdict for the Plaintiff, Harris moved in arrest of judgement, that the Ven. Fac. should have been as well from the Manor, as the Towne: but the Court gave judgement for the Plaintiff, because it doth not appeare that the Manor was larger then the Towne, and since the verdict passed, the Court shall not defeat it upon a possibility it may be so; not bee, as like the Case of Towns and Parishes, but if the villas were to come from two Townes by the Records, and were taken but from one, the Case were cleare contrary.

Vt. fac. whence.

## Clerke Vers. Wood.

Case.

CLERKE brought an action of the Case against Wood, and saied that he was seised of a messuage in Fairfield, to which hee had Common appendant, and seven Acres in F. also, and that hee had also a way from his messuage to the said seven Acres in fee also, and by, and over it to Buntingford, and that the Defendant had plowed up the seven Acres, whereby hee lost both the use of his Common and way; upon Issue not guilty, the Ven. Fac. was from Fairfield only, and after Verdict for the Plaintiff, it was moved that it should have been from Buntingford also. But the Court gave judgement for the Plaintiff, for though it is true, that if the Issue had been upon the prescription, it must have been from both, yet the Issue not guilty, respects chiefly the writ, which is the plowing up of that part of the way in F. which is a Trespass, upon the Case there, though the way went no further; so as the rest of the way

Vt. fac. whence.



is indeed but inducement to the action, and the way might have been laid onely to and from the house and that piece of Common, both in Fairfield,

Prohibition.

William Wright Plaintife, Gilbert Gerrard and  
Richard Hildersham Defendants.

Hil. 15 Jac. Rot. 1510.

Essex  
Waller.Stat. 17. H. 8.  
for dissolution  
of Monasteries.

The Plaintiffe declares in Prohibition, that Richard Stowden the late Prior of the Monastery of Hatfield, and his predecessors were time out of mind seised as well of the Rectory of Hatfield, as of a certain Farme there called Downchall Farme, in the Diocese of Ely, and by reason thereof did enjoy the said Lands discharged of Tythes, and then recites the Statute of 27 Hen. 8. for dissolution of Abbeys, and that the said Prior was under two hundred pound per Annum, and that by virtue of that Statute King Hen. 8. was then sumt & seinel of the said Parsonage and Lands discharged of Tythes, and that the Abbeys of Barking was wike of the episcopie of Litchington, and that on 3 November 29 H. 8. conveyed the Manor of Litchington to H. 8. and King H. 8. conveyed the said Lands called Downchall Farme, and the said Rectory to the Abbeys of Barking; by virtue of which conveyance the wike thereof seised. (and then speaks not of the discharge of Tythes) and 14 November 31 H. 8. he incorporated them together with the whole Monastery to Hen. 8. and then recites that amongst clause of the Statute of 31 Hen. 8. for enjoying of Abbeys Lands discharged of Tythes; And that by force of the grant of the Abbeys of Barking and of the said Statute H. 8. was seised of the said lands discharged of Tythes: And he being seised, granted the same to William Barnes & others, and bying down the title of the Land to one Glascocke, and the Plaintiffe by Lease, and then recites the Statute of 32 Hen. 8. and 3 H. 6. that none should be compelled to pay tythes for Lands discharged of Tythes, & that though the said Farme and Lands were discharged of Tythes, &c. that yet the Defendants said Glascocke and him for Tythes, &c. That Glascocke died, leaving the said there, and that he pleaded as supra there, and yet they refused to pay Tythes, &c. And thereupon the Defendant by motionation during the writte by Prohibition on to the Prior of Hatfield, demurs upon the Declaration, and prays consultation.

The Plaintiffe demurs and prays that consultation be granted. It seems his prayer should be, that the Prohibition should stand. But aliter is well enough.

The case in short is thus. The Prior of Hatfield and his predecessors time out of mind, were seised of the Parsonage of Hatfield, and a Farme in the same Parish, called Downchall Farme, together.

The Prior being under two hundred pound per annum, was given to the King by the Stat. of 27 H. 8. the King gives the Parsonage and Farme to the Abbeys of Barking, the Abbeys surrenders all to the King. The question is, whether the King and those that come under him shall hold this Farme discharged of Tythes, by force of the perpetuall writte.

And it was answered against the Plaintiffe, and a Consultation granted, by the writtome consent of all the Judges.

This Case doth consist of two great points, as they arise in order of time.

1. Great point:

The first great point is, Whether as this Case is, and as it is pleaded, this Land ought to be discharged of Tythes, though it had come to the King onely by the Statute of 31 Hen. 8. That is to say, that it had never come to the Prior of Barking, by reason whereof and of her surrender it was vested in the King by the Statute of 31 H. 8.

And I am of opinion, that in that Case they had not been discharged.

The

The second great point is, whether upon the whole matter and the Consideration of a double means whereby it came to the King, viz. by 27 H. 8. from Halesfield and by 31 H. 8. from Barking, and upon consideration of both these Statutes this Land ought to be discharged, by this unity of Tythes. And I am of opinion that it is not discharged.

1. Great point

Now the first great point I doe subdivide into foure petty points, which doe all conclude to the judgement of the first great point.

First, Whether the appropriation in this case came to the King, and remained in him a personage appropriated by force of the Statute of 27 H. 8. only, as well as the like appropriations did by the other Statute of 31 H. 8.

1. Petty point

And I am of opinion, that it came to the King by appropriation, and so continued in him, by force of that Statute only: For if that were not so, the appropriation had been dissolved ipso facto, by the dissolution of that Abbey, and so had not come to the King nor the Abbots of Barking from the King, nor from her assigns to the King.

The second point, Whether unity of personage appropriated, and Land, having been in a small Abbey time out of mind (as in this case it was) and so coming to the King by the Statute of 27 H. 8. only, doth teach a discharge of payment of tythes.

2. Petty point:

And I am of opinion that it will not. Wherein these will speake of discharges of Tythes in generall, within that Rate of 27 Hen. 8. which stand cleare with that Law, and which not.

The third point, Whether the clause of discharge of payment of Tythes, contained in the Statute 31 H. 8. can be extended to the small Abbey, and their Lands which came to the King by the Statute of 27 H. 8. only.

3. Petty point.

And I am of opinion that it cannot be extended to them.

The fourth point, as this case is pleaded, that is to say, repeating only the clause of the Statute 21 H. 8. that gives the discharge of payment of Tythes, without mentioning either their vicarage, or any of the other clauses that restraunt and restraine that Statute, to those Abbots that came to the King after the fourth of February, 27 Hen. 8. which excludes this Abbey, so that now this Clause may seeme as generall to the Court in meaning, as it is in letter, so that it may comprehend as well those Abbots that came by the Statute of 27 Hen. 8. and so before the fourth of February, &c. as well as after, whether now the Court shall judge upon that Clause of the Statute of 31 Hen. 8. only without taking knowledge of the other parts of the said Statute, which gives the Clause another construction, then by it selfe alone it should have.

4. Petty point:

And I am of opinion, that the Court shall take notice of the whole Statute (though part be omitted materiall) and judge accordingly. And that therefore if it had not come by Barking, and so within the Statute of 31 Hen. 8. the Court could not relieve it by this Clause, as generall to all Abbots, by the advantage of the generality of the Clause, (as it is uttered in pleading) so this point is handled, as though it had not appeared to come to the King by Barking, Scilicet by 31 H. 8. but only by 27 Hen. 8. because as the Clause is generally, it seemed to benefit both alike, as well those that come by the 27 as 31 Hen. 8. though in truth and upon the Consideration of the whole Statute of 31 H. 8. it doth not so.

Now to the first point, or question of the first great point.

It is true, the Appropriations are not regularly grantable over, neither can they endure longer then the bodies, whereunto they were first appropriated: Whereof the reasons are, Because it carries not only the Glebe, and Tythes, (which they might grant away) but it doth also give them the Spiritualall Jurisdiction, and doth make them Parsons of the Church, and doth supply Institution and Induction, which being the highest parts of trust, cannot be estranged, and therefore the Instrument of Appropriation runs in these words, That they and their successors (not their assigns) shall be Parsons, or by Periphrasis hold the Church in proper use. Now yet by Parliament Appropriation may be translated.

To the first great point, the first petty question thereof.

But the question is, whether the act of 27. gave them unto the King in Stat. of appropriations. Against which it is objected, that the Statute hath not the words of appropriation; which in a thing of so singular nature, and so first to one certaine body, in point of care and function: shall not bee taken within the meaning of the Law, without some perfect and proper word to carrie it.

Secondly, it is objected in opinion in the Bishop of Canterburie Case, Co. lib. 2. for 17. that all Appropriations had been dissolved upon 31 H. 8. if the Clause of discharge in that Statute, had not been. To this an answer hath been endeavored, that the Statute gives to the King their Tythes and their Land which carrie their Tythes, which is the whole Parsonage say they; But I allow not this answer: For these things may be well taken for Common Lands; and Tythes, for portions of Tythes divided from the parsonage charge: For it shall never be understood that the appropriation should be dissolved and the Church, made presentable, and yet by the same Statute, both Tythes and Tythes should be taken from the Church, and given to the King: For this were as much as is said of Julian the Apostate, that he did occidere, non Presbyteros, sed Presbyterium.

But I hold, that appropriations are well given to the King; and that by a word proper enough. For, the Statute gives (inter alia) the Churches, Chappels, Abbots, and Patronages, of such Monasteries which must be understood their Churches, as they were in them either appropriate where they were so, or their Abbots where they were not otherwise it were a mere Cantology. Firch, N. Br. 32 G. Ecclesia & Rectoria, are Synonyma, and the words of appropriating, are that they may hold Ecclesiam & Rectoriam in propriis usibus, as Grendons Case is. Again, this Statute gives all those Monasteries whereof the possession did not exceed two hundred pounds per Annum, so whatsoever made in that yearly Revenue was meant to be given to the King. And it was notorious, that a great part of of their yearly profits, did consist in Appropriations, for it was easie for them to get Abbots, and as easie to get them appropriate.

Also it was the cleare purpose of the Statute to give the King all that those Abbots had, and therefore the saying doth exclude the Founders, Patrons, Donors, &c. But if the appropriations should be dissolved, the giver should be restored to his Patronage, and Pridies Case, Co. lib. 11. 13. says, that appropriations in reputation passed both by the Statutes of 27 and 31 H. 8.

Also note, that the Statute 31 Hen. 8. recites the surrender before made of divers Abbots, & inter alia; to all their Churches, Chappels, Abbots, Patronages, (and names, not appropriations there) but in the purchase gives appropriations by name, in majorem cautelam, as being granted before in true meaning, though it is true that such Grants or surrenders without the Statute, would not have carried appropriations. Therefore by the word, Churches, the appropriations were conceived to be granted; and so settled by the Statute: and therefore the pleading is, Virtute fursum redditionis prad. ac vigore Stat. &c. For the Statute gives not in intent, but doth best only, saving this speciall Case, which I note, because it is a singular Case.

And upon this I observe further, that all the appropriations of Abbots that were surrendered between twenty seven & thirty one Hen. 8. were ipso facto dissolved, with the dissolution of the corporation, and were presentable and might have new Incumbents. But as soon as the Statute of 31 H. 8. came, the appropriations were restored, and given to the King, and the Incumbents entered.

And touching the opinion before mentioned, I wonder from whence it sprang; For since the body of the Statute of 31 H. 8. gives appropriations by name, what needs the other Clause for that purpose? and if a by Clause can doe it, why should not the maine body? So that conceit isaine.

Now to the second point, or question, of the first great point. This Statute hath no Clause for discharge of payment of Tythes, as that of thirty one of

Hen. 8.



H. n. 8. hath, neither any thing to give colour to it, other then the Clause, that the King shall have the Lands &c. in as large and ample manner, as the Abbots held the same.

Now there are five waies or meanes whereby Abbey Lands are holden discharged of Tythes, that is to say, Composition, Bull or Canon, Order, Prescription of discharge, and unity of possession of parsonage and Land time out of minde together without payment of Tythes. Of these five the former first discharges, the Abbots themselves had, or might have them, but the fifth was no discharge in the hands of the Abbots, but it made a discharge of payment of Tythes to the King, and those that claim under him by the favourable construction of that clause of 31 Hen. 8. for so much as that clause extends to, which opinion was long controverted, being confuted of all hands, that it was no full and perfect discharge in Law: so then it follows, that these lands can receive no good by this unity, unless they be within the Releife of that Clause of 31 Hen. 8. whereof we shall speake hereafter.

Now of the other four, The first three, that is Composition, Bull or Canon, and Order were granted and affixed unto the body of the sponasteries, and were granted unto them as personall privileges, in respect of their spirituall abilities or Functions, and their Capacity of Tythes, and discharge of Tythes for that cause; And therefore these had all vanished and expired with the dissolution of the body, if they had not been preferred to the King and his Posterities by that Clause. But discharge of Tythes of the Lands of sponasteries by prescription is of another nature, for having been always (as prescription viamque) in spirituall hands, the Law judgeth that it was never charged with Tythe: as the pleadings is that the lands were immunes a solutione decimarum negative non privative, scilicet, uncharged not discharged, as if they had been once chargeable: The reason whereof was, that being spirituall persons, they were able to minister to themselves spirituall rights, and therefore performing Officium, they might retaine Beneficium: And this non-charge standing upon prescription was inherent to the Land, not as a thing given, but as a non ens, Lands that never yielded Tythe, and Land of the little sponasteries so free of Tythes, the King by the Stat. 27 Hen. 8. and his Posterities were to hold free not by reason of any privilege, which did need to be preserved by any Statute, but ever by the grant of the Land by any kind of Conveyance.

And therefore though I said, that discharge of Bull or Composition was to dye with the Corporation, yet if it were once runne out time out of minde, it was then to be pleaded and used as a Non-charge, by prescription, which was a Title of discharge by the Temporall Law, and if it were impugned, it was to be dyvined by Prohibition to a tryall at the Common Law, and this without the helpe of any Statute. And therefore in the Bishop of Winchester's Case, it was resolved that the Bishop holding lands of his Bishoprick, discharged of Tythes by prescription, his Farmer being a layman, shall have a Prohibition for his discharge; and so shall the Bishop have himselfe, though he be a spirituall person. And yet Bishopricks and their Lands are in point of discharge of Tythes at the Common Law, out of all Statutes: So then, the Conclusion is, that of the five waies of discharge of Tythes, three, that is to say, Order, Composition, Bull or Canon, are preserved and kept alive by the Clause of discharge, in the Statute of 31 Hen. 8. and a fourth, which is Unity, is created by that Branch, and the fifth which is Prescription, stands by the Common Law, and hath no need nor use of any Statute.

Now to the third question, of the first great point, the Lands of the small Abbeyes coming to the King by the Statute, made at the Parliament, holden 4 February 27 Hen. 8. cannot be aided by the discharge of Tythes, in the Stat. of 31 H. 8. For first all, the small Abbeyes shall be said to the King the first day of the Parliament, scilicet 4 Feb. according to the rule of 33 Hen. 8. because Acts take effect the first day of the Parliament.

Then take the whole Statute of 31 Hen. 8. and you shall finde that the sponasteries

The third petty question of the first great point.

Monasteries therein mentioned, are divided, both in the preamble, purbeins, and other branches, into those that come to the King since (that is after) 27 H. 8. (as it were de industria to exclude the little Monasteries given by that Statute and those that should come to the King after the Statute of 31 H. 8.)

And so he proceeds in that Clause, that puts them in the Warrey of the Court of Augmentations; and in the other Clauses alwayes uses the said late Abbots which restrains them; And even in this clause of discharge though there is in the body any Monasteries, indefinite, yet the Preamble of that clause recites, where divers of the said Abbots enjoy their lands discharged of payment of Tythes: Be it therefore &c. that the King &c. shall hold discharged of Tythes as the said late Abbots &c. do. so the Preamble is plainly restrained to the Abbots in that law and the purbeins (be it therefore) depends upon the reason of the Preamble and the said Abbots, in the conclusion reduceth it to this, that the Land of any Monasteries shall be holden discharged as the said Abbots (scilicet mentioned in this Law) hold them; and this case is in effect judged in the Bishop of Canterburie case, where it is judged, that Lands of Chanteries comming to the Crowne by the Statute of 1 E. 6. are not within the release of this clause for three reasons.

First, that a branch of a Statute, shall not be taken larger then the body.

Secondly, that Chanteries being in the King by one Act of Parliament shall not be judged in him by another.

Thirdly, that the forme of pleading was never so, the King was seized by force of both Acts: all which fits this case. And yet more (as hath been said) the lands of 27 H. 8. are by expresse termes excluded, out of the Statute of 31 which is not so in Canterburie case, and so 10 Eliz. Dyer 341. for the point of Release.

Fourth petty  
question of the  
first great point.

Now to the fourth question of the first great point; If this had been a particular Statute, whereof the Court could take no other knowledge but as it was pleaded, this clause must have been taken generally for all Monastery lands, because there was nothing in the plea, that restrains the generality of the words and the defendant might at his choice either plead, that there was no such Act of Parliament, or else might shew the further additions and that in another term: as if a man should plead a devise to him and his heires and the devise indeed is so in words, but then goes on, and addes that it be dyed without issue, it shall remaine over the Abbotary may either traverse the devise generally, or shew the Addition, but being a generall Law, the Court may take knowledge of the whole. But then though it be a generall Law, if it be mis-recited the Court shall take knowledge, of it as it is resolved in Partridge, and Crokers case Plow. 84. and Lord Cromwells case: Coke lib. 4. fol. 13. But note in the first of those cases, the Statute, was pleaded made at a Parliament, when there was no such Parliament; and in the other the substance of the Stat. was mis-recited, so both appeared to the Court false. But in this case there is nothing pleaded false, but onely there is an omission of some part of the Statute, that may give another sense to this clause.

Now then this being a generall Law, there was no need to plead it, nor any part of it, no more then when you plead a scotment to uses to say that virtute cuius & vigore Statuti, de usibus, &c. though the use of pleading be so, for when you have laid down the case, the Court in generall Statutes, makes application of the Law without your helpe. So then, since he hath in this case recited some part of the Law which he needed not have done, and that truly, you shall not require at his hands to repeat either the whole Law, preamble and all, or else at his perill to call out all parts, that are materiall to give construction to that part that he pleads; for that is the office of the Court, and not of the party.

Now to the second great point of the case, the Judges must be very considerate, not to extend the discharge of Tythes, by way of unity, beyond the bounds whereof it hath gotten possession; for diverse reasons.

The second  
great point.

First,

First, It is no friend to Religion, for, it takes away the nourishment and reward of learning, and industry of Church-men.

Secondly, It is against common right, and the common Law of ENGLAND, for according to them it is no discharge.

Thirdly, It is an encroachment, even beyond the usurped Authority of the Pope of Rome, by which it was no discharge.

Fourthly, It was such a Beares Will helpe, as it was an age before it would be brought in any shape, and yet when all was done, it was cast into a forme of pleading which departs from the Rules of all Art of reasoning; For, it is pleaded thus for example. The Bishop of Hatfield, &c. time out of mind, was seised of the Parsonage and Land, simul & semel & ratione inde, held the land discharged, &c. And yet you may not deny the Argument, which must be; That unity by Prescription dischargeeth though it be confessed to be false. And if you suppose the Major and turne it into a Syllogisme, you are not allowed to deny it as to deniers in Law upon it, yet to disorder such an unity is with a cleare Non-payment of Tythes, time out of minde, in a body spiritual capable of a discharge, it might have been laid as an absolute discharge upon better reason directly, then to lay it upon the unity; For, the presumption of a perfect discharge, in that case was not doubtfull, for in Pridles case, Co. lib. 11. fol. 14. it is truly said; That an unity and a perfect discharge by prescription may stand together.

Now then it is agreed, that where the unity is such as is allowed for discharge, it is not so allowed for it selfe, and of its owne strength, but in contemplation of a true discharge, which in such confusions of possessions and privileges of all natures may well bee conceived, though it cannot bee shewed. Now that presumption failes in this case. For, where there are four wayes as hath been said to discharge Abbey Lands of Tythes: That is to say; Order, Composition, Bull, or Canon, and prescription; All these may be presumed to maintain the discharge by unity where the same body of the Abbey continued till, both of the Parsonage, and the Land, from beyond memory, till the Statute of 31 H. 8. For, then that Statute, and the clause of discharge thereof, did attach upon it with full advantage. But in this case which is a novelty three of those presumptions faile with the Bishop of Hatfield, as hath been said, that is Order, composition, and Bull, or Canon.

Now if it be said that if the Abbey of Hatfield were discharged by prescription that that remains. I answer, that if it bee so taken, it makes expressly against the Plaintiffe, for that discharge is sufficient of it selfe, according to the course of common Law, and hath no need of the helpe of any Statute, as hath been said, and therefore cannot bee admitted, in understanding to maintain an unity, which hath no force but by the Statute of 31. For, Fiction is never admitted where truth may worke, as where Cestuy que use, and his Feoffee joine in a Feoffment, it shall bee the Feoffment of the Feoffee. So where in Pridles case it hath been said, that an effectuall unity must have four qualities, that is to say, it must bee perpetua, equalis, legitima, & libera; You must adde unto it a fifth, that is, it must continue in the same body; or else the presumption of true discharge ceasing loseth his force. And I am of opinion, that if in this case the Plaintiffe should lay the discharge by prescription, that the Defendant might avoid it by shewing that the Abbey was discharged by Order, Composition, or Bull, within the time of memory, or at the least it were a great evidence for him.

Kibbet



## Kibbet Ver. Lee.

Tr. 17 Jac. Rot. 1880.

Middlesex  
Brownlow.

Judgement.

The sole maine  
question.Whether an  
actual revoca-  
tion may be  
made by the  
afore said pro-  
prio.

Thomas Kibbet brought an Ejectione firmæ against George Lee for certaine lands in Huntington, of the demise of Thomas Lee. Upon issue not guilty, the Jury found that George Lee, Father of the lessor and of the defendant, did by Indenture covenant to stand seised of the Lands in question, to the use of himselfe for life, and after his decease to the use of George Lee his sonne and heires; which is now the defendant, and the heires of his body, the remainder to his own right heires. Provided nevertheless, that if George the Father, should at any time during his life be minded upon any occasion to make void or change the uses, that then it should be lawful for him being in perfect health and memory by writing under his hand and seale, and by him delivered in the presence of three credible witnesses to declare that his will and pleasure is, that the said uses or any of them should be altered or made void, and that then and from thenceforth the said uses shall be void, and the said George the Father, and all other shall stand seised to such uses as by such writing shall be limited. And then they find that George the Father made his last will in writing under his hand and seale, and thereby did devise the said tenements to Thomas Lee the lessor, and the heires of his body, and for want of such issue, to his sonne George in tail, the Remainder to his daughter in Fee, and that the same last will was sealed and delivered in the presence of four (naming them) being credible witnesses, and then George Lee the Father died, and Thomas Lee the younger sonne entered and made the Lease, upon whom the defendant George Lee entered and ejected him Et si dec. And hereupon judgement was given for the plaintiffe: by my selfe, Warburton and Winch, Hutton only differ- ing. The sole maine question being whether a Revocation actual, or an Act implying so much, may be made by will, by force, and within the meaning of this proviso.

And it was agreed first, that though the verdict did not shew that George the Father was in perfect health and memory, yet that was well enough for it, will be presumed, except the contrary be shewed. And so for the presence of sufficient, and credible persons. Otherwise if it were in the presence of sufficient, but not of credible persons.

Next it was agreed, that all Forms and circumstances prescribed must be observed, as here it must be by writing, signed, sealed and delivered in the presence of witnesses as supra, which though they be not all requisite in a will as it is a will, yet as it is a Revocation within this proviso, it must have them. Scroops case.

Now though this be true it is to be understood of Forms and circumstances that are expressed and not imagined.

Now then here the Will is a writing under hand and seale, and delivered in the presence, &c. In all the expressed circumstances are observed.

Against which it was said by my brother Hutton that it is to be understood of a Deed according to vulgar speech, and the rather because in such clauses the last Will is especially mentioned.

And lastly, that the clause is, That from thenceforth, that is (say they) from the sealing and delivering, the old uses shall be void; which cannot be in case of a Will, which is ever revocable, and takes no effect till death, nor in this case, which was so farre agreed.

But it was answered by the Court, and so resolved, that though Revocations must observe the circumstances, that the owner imposeth upon himselfe, as hath been said, yet no more shall be imposed upon him, but his power shall be taken favourably as agreeable to nature, that every man have freepower over his owne, which is the reason that the latter Act that cannot stand with the former uses is

is construed a Rebovation, though according to the expresse word and vulgar sense it is none, Scroopes and Fitz William case. Also where a condition dispensed or extinct in part extinguishes wholly as being odious in law, the case of Rebovation is cleane contrary: for if the power extend to 100. Acres, and I make a Feoffment of 10. I may nevertheless reboke for the rest. So the power of Rebovation is to be taken literally, and the execution of it is voluntary. Now then for the clauses, [When and thenceforth] they are impotent and of no force, for the power of Rebovation is perfect and complete before they come to these words in these words. [What if it be his pleasure to retain them by him or his willing &c. declare them void,] and then words needless that not impose a clause certain and perfect without them. And yet further being truly considered, there is no repugnancy in them: For my meaning is, that he that has power to declare them void according to his pleasure, that is, according to the nature of his declaration in Law, which in case of a Will is from his death, or according as he shall expressly appoint the time. And therefore if in this case George Lee the Father had made a simple writing of declaration, and not in the manner of a deed, to any certain person, that his uses should be void, and had signed, sealed, and delivered it in the presence of three credible witnesses, and had either in the body of the deed, or verbally declared that it should take effect upon an hundred pound paid, or at his death, and not before: And this Rebovation should be good, and yet shall not take effect from the making, but from the time appointed, within these words: [When and thenceforth], whereof it follows that the former estates being revoked, the will is good for the whole, working as a will, which maintaineth the judgement. But if the Land had been holden by knights service, and the devise to a stranger, it could have carried but two parts as a Will, and by force of the Deed or Covenant it could carry nothing to a stranger, and if the Land had been in fee and devised to the heirs as it is here, it can carry but two parts as a Will, and I doubt it could not have carried all as a declaration of new uses upon the power of the Covenant, for since this devise (if it should work so) cannot take effect during the life of the devisee: and Covenantant, it amounts to no more, than as if a man should covenant that after his death his heirs should have lands to the use of his younger son: which I hold to be void.

Long Ver. Hobart.

B. R. Tr. 27 Eliz. Rot. 830.

Ejection. A. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

Thomas Windmore Lessee of Edward Long Plaintiff, and Nicholas Hobart Defendant in Ejectione firmæ for land in Polsholt, in Com: Wilts. thus set forth. It was found by a special verdict that William Lord Starton was seised in fee, and that 24. Maii, 28 Hen. 8. Per quoddam scriptum suum indentatum, sigillo suo sigillatum, dimisit cuidam Thomæ Hobart tenementa pried, habend. eidem Thomæ & præfato Nicolao Hobart, ac quibuscumque Johanni Hobart & Henrico Hobart filijs prædicti Thomæ pro termino vitæ eorum & alterius eorum successivæ, diutius viventium. William Lord Starton granted the Rebovation to Thomas Long and his heirs, who devised the rebovation to Edward Long the Lessee, in fee, and byed. Thomas Hobart and Henry Hobart byed, and Nicholas and John survived, and the Lessee entered, and made the Lessee to the Plaintiff, and the Defendant entered.

Judgement.

And in this case, judgement was given for the Plaintiff after long debate, and upon great consideration, whereof the reasons were, first, that none could take by the Deed immediately but Thomas Hobart because he was only party to the Deed, and the rest not named, but by the Habend. then they cannot take but by the way of Rem. which cannot be joint because of the words successive &c. And in succession they cannot take, for the uncertainty who shall begin and who shall follow, which in the case, 20 El. Dyer is ascertained by the Clause Successive sicut nominantur in Charta.

Error.

Greenwood Vers. Tyler.

Tr. 16 Jac. B. R. Rot. 1089.

**N**Ous this Terme Mich. 28 Jacobi, by a Writ of Error out of the Kings Bench, came this Cause before us, Robert Greenwood brought an Ejection Firme against John Tyler, of Lands in Box in the said County, and upon issue not guilty, a speciall verdict was found, Que Anthonic Long & Alice sa femme fuero nt feils in fer, in droit Alice del dits tenements in que &c. & sic seist, 20 Aug. anno 2. E. 6. un Indenture fuit fait enter le dit Anthony Long & Alice sa femme del un part & un John Fisher del anter part per que les dits Anthony Long & Alice sa femme demise & lease al Farme per Indenture al dit John Fisher & Anne sa femme & Johanne leur file les dits tenements in le Count mentioned. Habend. les dits tenements al John Fisher & Anne sa femme & Johan leur file & eorum diutius viven. successive a festo S. Michaelis Archangeli, donec que prochain ensuant le date del dit Indenture usque le fine & terme de leur vies naturallement rendant proinde annuatim durant. vitis suis ut predict. est le yearly rent de 23<sup>s</sup> 4<sup>d</sup>. oveque un harriot de leur best animal post eorum decessum sine exitum Anglice going out cupilibet eorum: ove Covenant de part John Fisher & sa femme & Johanne leur file de payer tous tres Rents & autres Charges and Duties usuant hors de ceste terre durant leur vies ut profectur apres le sealt de S. Michaelis ayant dit, & dit Anthony Long & Alice sa femme delibereb sellin in person al dit Johanne Anne sa femme & Johanne leur file solongue le forme & effect del dit Indenture. Anthony Long, morust & apres Alice sa dit femme recuste le Rent del dit John Fisher, & puis ceo les dits John Fisher & Anne sa femme morust & Johanne leur file enter; apres que le dit Alice puis sa Acceptance del dit rent enseoffa Henry Long su fess south que le Defendant claim. Et la dit Johanne la file que est une, in vie prist, a Baron un Anthony Tyler & ils lessant al dit Robert Greenwood prout in the count del Ejectione Firme per que le dit Robert Greenwood fuit possesse tanque fuit Eject per le dit John Tyler sur que fuit adjudge in bank le Roy pur le dit Robert Greenwood le Plaintife in le Ejectione Firme & sur ceo de Defendant John Tyler port bre. de error.

En bank le Roy sur grand debate de le cause fuerunt ceux points resolves com suit report a nous.

1 Attorney or  
the party makes  
livery differing  
from the deed.

2

1 Que le livery & seisin fait per Anthony Long & sa femme in person puis le Feast de S. Michael secundum formam Chartre fuit bon. Auterment ust esse si le livery de seisin ust ee fait per Attorney solongue le Case de Buckler & Harvey.

2. Reports fo. 55. ou devant le Feast.

3

2 Que Anne la femme de John Fisher & Johanne leur file ne pouvoit prendre joynt estate ove John Fisher per le dit Indenture de Lease, co que le dit Anne & Johanne ne fuer. parties al dit Indenture solongue le case de Winmore & Hobart donec cited.

4

3 Et que Johan Fisher ne prendra aucun greinder estate que pur sa vie demesne, & nient per les vies de luy mesme, Anne sa femme & Johanne leur file, co que ils deux fuer. intend de prendre estate al eux mesmes & pur ceo leur nosmes ou vies ne ferr. limitation ou increase del estate del John Fisher contra al intencion del fait.

4 Et tamen que le fait in les premises & in le habend. ne setra auterment void quoad le dit Anne & Johanne mes que le fait al eux donera estates en Remainder perforce del parol (successive) limit al eux in le habend. devant le estate pur leur 3. vies en ceo mention. Isuit qu le successive la va a distinguish leur severall estates & successive possession, l'un puis l'auter, successive, solongue le Case 20 Ellis. fo. 361.

Et en ceo de varier del le successive in Winmore & Hobarts Case co que la sentence fuit fait inter William Lord Sturton de l'un part & Tho. Hobart del anter part, & pur ceo le dit William Lord Sturton lessa al dit Tho. Hobart habend.



habend. al dit Tho. Hobbard, & Nicholas & John & Henry Hobbard, pro termino vitæ eorum & alterius eorum successive diutius viventis.

Pur que la le successive apres les joynt vies limit ne extend a lour persons, mes le limitation (de successive diutius viven) apres joynt estates pur vies limit ore mfe. que lestare continue si longe come aucun de eux vive & nemy pur divider les estates, mes in le principal cas icy le limitation est habend. al eux 3. noismant eux & eorum diutius viven. successive que extend al lour persons pur terme de lour vies: Issint le successive esteant devant le limitation de aucun estate issint est placed pur divider l'estate.

Ideo in le Case de Winsmore ceo ne fait lour estates severall quia nest limit al ceo, mes autrement serra en cest Case en variance potius que ceo serra al eux un void limitation solonque l'opinion de Justice Sanders in Coltheris Case, Com. fo. 29. sur le livre de 17 E. 3. fo. 29. & 18 E. 3. fo. 59. & 39. Ass. plac. 20. on le heyre priest per voy de Rem. quia impossibile sur le fait de prendre estate in possession.

But in debate of this Case upon the Writ of Error, we were all of opinion, That there was no material difference between Winsmores Case and this, so that the judgements could not stand both together. And therefore we applied the Defendant to compound with the Plaintiffe, in the Writ of Error.

Sir William Elvis Knight, against the Archbishop of Yorke,  
Martin Taylor and Thomas Bishop, Clerkes.  
Pas. 17 Jac. Rot. 877.

Quare Imped.

Sir William Elvis brings a Quare Imped. to present to the Church of Bad-  
Sworth, and declares, that Sir Gervas Elvis Knight, was seised of the Manor  
of Sanby, to which the said Abbotsdon is appendant in Fee, and held the same of  
the King, and so seised did present one George Turpin his Clerke, who was ad-  
mitted and instituted, &c. And the said Sir Gervas so seised was attainted of  
Felony and executed. By force whereof the King was seised of the said Manor  
ad quod &c. In Fee, in right of his Crown, and so seised did grant the  
Manor and Abbotsdon thereunto belonging to the Plaintiffe and his heires,  
adeo plene & integre, &c. by vertue whereof he entred, and was seised there-  
of in Fee, and so being seised, the Church became void by the death of Turpin,  
whereby it belonged to the Plaintiffe to present, and the Defendants did disturbe  
him to the Damage of five hundred pound. Actio non; confesseth the seisin  
of Sir Gervas Elvis, and the presentation of Turpin, and the Attainder and  
Execution as the Plaintiffe hath set forth in his Declaration: But further  
saith, that by vertue of the said Attainder, the King was seised of the Manor  
ad quod, &c. In Fee, in right of his Crown, and so seised, the Church became  
void by the death of Turpin, whereby the King to the Church being void did  
present to the said Archbishop the said Thomas Bishop, whom he caused to be  
admitted, instituted, and inducted, as it was lawfull for him to doe: without  
that, that the King did grant to the said William Elvis the Abbotsdon, prout,  
&c. Whereupon the Plaintiffe demurs in Law generally.

Nottingham.

The plea of  
the Archbishop.

That he is Parson Imparsonce of the Church aforesaid, by the presentation  
of the King, and says, quod Actio non, because he says that Gervas Elvis was  
seised of the said Abbotsdon as of the Abbotsdon in grosse, and confesseth the  
Attainder, and that after the death of Turpin, the King did present the said  
Bishop, who was admitted, instituted, and inducted, &c. and was Parson im-  
parsonce at the time of the purchasing of the Writ, &c. Without that that the  
Abbotsdon aforesaid did belong, and as yet doth belong to the said Manor of  
D. prout, &c.

The plea of  
Bishop the In-  
cumbent.

Whereunto the Plaintiffe replies that Bishop is not Parson imparsonce  
of the presentation of the King prout, &c. Ideo petit quod inquiratur, &c. Where-

The plea of  
Taylor.

upon Bishop demurres in Law. That one John Sidenham Gentleman, was seised of the said Manor ad quod, &c. In Fee, and so seised in the 16 years of Q. Eliz. by Indenture, &c. did grant to Richard Ridley and Eleanor his wife, the said Abbotson for the three first Abbotances. The Church became void by the death of one Lilly, which was the first Abbotance, &c.

To which Church, the said Sidenham seised of the said Manor, (and having no right to present,) did present one Richard Clifton his Clerk, and the said Clifton being Rector of the said Church, the said Church became void, by the deprivation of the said Clifton, which abbotance was the second abbotance, &c.

And the said Sir Gervas Elvis father of the Plaintiffe, being seised of the Manor in Fee, and having no right to present to the said Church, being void, did present to the said Church being void the said George Turpin, Qui, &c. And that he the said Turpin being Rector of the said Church, and that the said Ridley and his wife being possessed of the said Abbotson, the said Ridley dyeth, and Eleanor survives, and was solely possessor of the Abbotson, and first makes Martin Taylor her Executor; and dyeth, whereby he was possessed, and so the Church became void by the death of Turpin, which was the third Abbotance &c. whereby the Defendant Taylor did present the said Bishop his Clerk, as it was lawfull for him to doe, and demands judgement Si Actio Sec. Upon which the Plaintiffe demurres in law generally.

The first point:

The first point is, Whether this Plea of the Archbishop to counterplead the title of the Plaintiffe to the patronage, be good or no.

And I hold it to be not good: Wherein let us consider how it stood at the Common Law, and what alteration is made, as to this Case, by the Statute.

And first for the Common Law it was plaine, That neither Ordinary as Ordinary, neither before Collation nor after, nor Incumbent, either of his Collation, nor of the presentation of any other, could plead to the title of the patronage, whereof the reason was pregnant, because neither of them had interest in the patronage, and therefore could not dispute that, with which they had nothing to doe, which is the reason that his collation by Rapt (or before the Laye incurred, though it be a wrong) doth not displace the Patronage but shall be said to be done in the right of the very Patron, being nothing but institution and induction which are his office as Ordinary as well upon presentation, as without, though he doth them out of season.

And though this seemed, and was indeed extremely mischievous, yet the Law would not let in a thing so absurd and against the Law of Nature, and Reason, as to admit time to dispute the Interest of a third.

This mischiefe notwithstanding, had a kinde of Remedy in some Cases; For, if the Quare Impedit were brought against the Bishop, and the Incumbent, or the Incumbent alone leading out the Patron, the Incumbent might have pleaded in abatement, that he was Parson imperfect, of the presentation of such an one, who was alive and not named, and then the writ should abate so that though he could not plead himselfe to the Patronage, yet he needed not to answer without the Patron, which could plead to the right of his Patronage, and so defend his Clerk.

But yet there were two Cases of mischiefe still, the first, when the Patron was for so, if he would collude or plead a false and faint Plea, and give way to the Plaintiffe, the Incumbent was without remedy, whereof the Common Law took little regard, both for the reason before spoken of, and because coming in by him, he was subject to his plea, as Rapt for years, and could not challenge at the Common Law.

And secondly, though it were regularly true that the patron was to be named, so that there was a manner to defend the Title, yet when the Incumbent came in by the King or Pope, they could not be named, and yet though the mischiefe to the Incumbent was inevitable, yet the common Law would not break her rules to receive the Incumbent to plead the Title of the patronage, no not in that Case.

This

This being so in the Case of the Incumbent, who had the whole Interest of the Church vested in him, and that by the presentation of his Patron, by whose title he was to stand or fall, that he could not pleade the Patrons title. Much less was the Ordinary to do it, for three reasons,

He had nothing to doe with the patronage, neither in Interest nor dependancy as the Incumbent hath.

He hath no meddling with the Church or the fruits of it, as the Incumbent hath. And if the Ordinary having collated by lapse could not pleade the title of the patronage to maintaine it (as by the Statute appeares) much less could he doe it before the lapse incurred.

The Law hath provided for him (if he will containe himselfe within the bounds of an Ordinary) sufficient means to save himselfe from making himselfe a disturber, and hath pleas to expresse and deduce the same, which the Incumbent hath not. For, if the Incumbent hath accepted the Benefice of his presentation, that hath no right or will not defend it, he must needs be a disturber, and yet was not allowed to pleade the Title at the Common Law. And therefore the Ordinary cannot pleade in abatement, that the Patron is not named as the Incumbent may, for his Office and Acts are not joyned, nor depend upon the Patrons, as the Incumbents doe.

Now I hold it not impertinent in this place, and upon this occasion, to shew, how the Common Law hath provided for the safety of the Ordinary against disturbance, if he will not exceed his Office, nor maintaine parts, but carry himselfe indifferently amongst them that pretend to the Patronage of the Church as hee ought to doe, being in a sort a judge amongst them.

First, where it hath been said, That hee ought to receive the Clerk of him that comes first, I hold the Law contrary, for as he may take competent time to examine the sufficiency and fitness of a Clerk; so may he give convenient time to persons interested to take knowledge of the advantage then in Case of death, and where notice is to be taken, and not given, to present their Clerks to it.

But perhaps if he doe receive the Clerks of him that comes first, he may quit himselfe of disturbance, because he doeth nothing but as Ordinary in Law, but let him looke to his conscience, if it be not done bona fide.

But if two or more present, so that the title is become litigious, then cannot he safely receive the Clerk of any, of his owne head, except the Title be certaine, but hath his way of safety by Jure Patronatus, and when hee hath used the Jure Patronatus and that findes for one party, yet he may still receive a contrary Clerk if he will, for who can let him? but that must be at his owne perill, which is well to be understood as a double perill, That is, first, that the Title be the better.

Secondly, that the Patron whose Clerk hee hath received, will pleade and defend that Title, for otherwise he cannot doe it, as hath been said.

But though after Inquest, in Jure Patronatus, the Ordinary may accept the contrary Clerks, yet it is against Justice and the intent of the Law; For, since it is a provision merely for the good and safety of the Ordinary, and he pretends doubt, and therefore puts the Patron to this inquiry to his Charge, and delay to satisfy and secure him, he ought to judge and receive the Clerks according to that Verdict, and that is the true meaning of Greens Case that hath been cited, and of the Bookes that say, that the Ordinary is to judge of the better Title, that is, not to pre-judge of his owne head, but secundum allegata & probata, upon verdict of the right given, and sound according to the sayme of Law, to give institution which is his judgement, and the execution his execution.

And though it be true, that it is but an inquest of Office, and therefore binds not, I confesse it binds not but with a distinction, that is, it binds not the Patron in his Quare Impedit, but is final, even to the true Patron, that he cannot impute disturbance to the Ordinary, following that verdict, and therefore it ought to bind him to follow it. For to those purposes it is a full verdict, never



to be tryed againe, as is a slight found by the Cojeners inquest to the sequestration of goods. And therefore I am of opinion, that if the Patron bring his Quare Impedit, in that Case against the usurper, and his Incumbent, not naming the Bishop, and proves his title, that he may afterwards have an Action upon the Case against the Ordinary, so; that without long, delay, and trouble, that hee hath put him to, and he shall recover costs and damages, not in respect of the value of the Church (so; there is no damage so; that, by the Common Law but by Westm. 2.) but so; the other respects I speake of. But if hee name the Ordinary in the Quare Impedit, he can have no other Action of the Case; neither shall he have such Action upon the Case, before he hath tryed his Title in a proper Action, and against the proper parties.

But yet in another point I am of opinion, that though but one present, if the Bishop make doubt of his title, as in many Cases hee may justly, being a stranger to it, he may require satisfaction by Jure Patronatus so; a notatione nominis, if doth not imply others parties, as a Juris utrum doth, but like a Quo Jure. And therefore take the Case to be, that a Parson is deposed by the Ordinary, or reads not his Articles. In which cases the Church is hold, and yet notice must be given to the very Patron so; that time, or else the lapse incurreth not (which is inconvenient so; the Church, and a prejudice to the Ordinary) how shall hee now assure himselfe of a sufficient notice? For, if he give notice to him that is not Patron, so; this very turne, his notice is vaine, and the Patron, perhaps knowes not of the deprivation, or if he knowes it, needs not present without notice given him.

I hold that in this Case his way is to averr a Jure Patronatus, with solemn premonitions Quorum Interest, And then inquiry being made who is Patron, and give him notice, and if he presents not within six moneths, then the Ordinary may Collate, though that shall not bind the very Patron, yet it shall exclude from disturbance upon the special matter shewed, but if the other supposed Patron present, and the six moneths incurre, Quare if the true Patron be bound since there was no notice given him. And I am of opinion, that though without notice, the Patron is not bound by the Lapse, yet that is nothing to save the usurpation of another pretended patron, who is not subject to give notice.

Thus farre of the matter and forme of pleading so; the Ordinary and Incumbent at the Common Law.

Now wee will see how it stands at this day, and what change is made by the Statute 25 E. 3. Chap. 7. pro Clero, Stat. 3. and what is the true meaning and use of that Law, which is thus: when an Archbishop, Bishop, or other Ordinary hath given a Benefice of right devoluate unto him by lapse of time, and after the King presenteth and taketh his suit against the Patron, who percase will suffer, that the King shall recover without action tryed, in decess of the Ordinary or the possessor of the said Benefice, that in such Cases, and in all other Cases like, where the Kings right is not tryed, the Archbishop, or Bishop, Ordinary, or possessor, shall be received to counterplead the title taken so; the King, and to have his answer, and to shew and defend his right upon the matter, although that he claime nothing in the Patronage, in the Case aforesaid.

The particular cause of this Law, is so; the reliefe onely of the Ordinary that hath collated by Lapse, and of the Clerk that is so collated, that they may both pleade to the title against the King, which when you consider it was a necessary Law, as against the King more then against Common Patrons. For, the King not being bound by lapse of time, if the Common patron suffered a lapse, and the Bishop collated lawfully, yet if the King pretending himselfe Patron, brought a Quare Impedit against the Ordinary and Incumbent, there was no meanes so; them to save themselves, since they could not deny the Kings Title, and maintaine the Patrons, in whose default the Lapse took place, but the Stat. gives remedies likewise in like cases by expresse words, so; that Cases of like nature, are rather remedied by Law then equity.

And therefore first in the Case of Lapse a common person might by practice, have

What change  
 is made by the  
 Statute 25 E. 3.  
 chap. 7. concern-  
 ing the plead-  
 ing of Ordina-  
 ries.

have turned out a lawful Collator, in one onely Case, and that was this: A Common person no true Patron presents within six Moneths, and the true Patron himselfe presents not in time, whereupon the Ordinary collates by Lapse, against whom the pretender brings a Quare Impedit because his Clerk was refused, wherein he must needs preballe if his title be good. And it must be taken for good, because neither Ordinary nor Incumbent could deny it, for, De non apparentibus & de non existentibus eadem est ratio.

This is one of the like Cases meant in the Statute. For, in all other Cases the Lapse is an equall title against all common persons.

But the commonest like Case, and that which extends farthest, is the parishioner for every Incumbent, that is called a possessor, as well by presentment as by collation, is allowed by the words of the Law, to Counterplead the Kings Title, and to shew and defend his own right upon the matter though he claime nothing in the patronage in the Case aforesaid.

Note all the words, for they have all their weight. For, first, the Incumbent must be a possessor, so that if he have his presentation, admission, and institution upon lawfull Title, yet remains as he was before, under the mischief of the common Law, because he is not a possessor according to the letter of the Law in Institution.

Again I say, that though he be a possessor, he must by the letter e meaning of this Law as well shew and defend his own right, as counterplead his Objections.

And therefore clearly he cannot make himselfe Person impurser of the Presentation of I. S. and defend himselfe by the title of I. D. under whom he claimes not, though that were sufficient to destroy the Plaintiffs title by confessing and avowing of the like, neither can he counterplead the Plaintiffs title, but must also make a title to himselfe by the word and meaning of this Law, which I speake not to binde the Incumbent by the Patrons plea, whereof I will speake hereafter, when I come to the Incumbents plea.

But touching the Ordinaries Plea upon this Statute, I hold plainly that he can no otherwise plead, then he could at the Common Law, but onely where he hath Collated actually by Lapse. For, though the Incumbent of presentation be also admitted to plead by the meaning of this Law under the word, (The Case,) because the Case is like indeed, yet the Ordinaries Case before actual collation, is no wayes like in case: for he hath gotten no interest for himselfe, nor his Clerk in the Church. And therefore, if the Incumbent instituted onely at the presentation of an other, be not within the release, much less shall the Ordinary, that hath no interest but an Office onely, that ought to be indifferent to all Patrons and maintaines no side. And yet more, if the Incumbent which is impleaded, be Defendant, in Quare Impedit, (which may plead by the Statute) and doe resigne hanging the Writ, he hath lost his privilege of pleading to the Title by this Statute, for as it was granted him to defend his possession, so when his possession is gone, there is no cause for him to use it: which reason also turnes strongly against the Ordinary, where there is no possession under him, for yet that Incumbent that hath resigned, may still plead as he might have pleaded at the Common Law. And Note that Case of the Parson resigning, hanging the Writ, which the Plaintiffe may plead against him to defeat him of his Plea, that he might once have had hanging the Writ, whereas in a Precipe quod reddat, if the Count pleads a release, the Demandant cannot say that he had aliened hanging the Writ, but is stopped. The difference is, because, that in that Case of the Precipe, the Demandant by his Writ admits him Defendant, but in the Quare Impedit, he is not named an Incumbent, but a disturber onely. Neither is the suite for the Incumbency directly, but for the Patronage of presentation. And therefore in the Writ of right of Advowson the Incumbent is never named, neither if the Demandant recover against his Patron, shall he be removed.

I have been the larger in this discourse, because I see the inconveniencies of Advowsons so incumbered by willfull usurpations, and disturbances of pretended Patron, Ordinaries, and Clerks, and the multiplicity and perperity of severall

Plead

Plaintiffs of the Defendants, be they never so many; to be set off if any one party against himself is better; and the uncertainty and variety of the leaning upon it, that it is almost impossible if a true Patron be put to his Action, but he will be satisfied that he shall have his right.

Wherefore first, I advise a Plaintiff in Quare Impedit to name no more Defendants than needs must; and so if the Church be once full of presentation, so that there is no danger of the Lapse, it is in vain to name the Ordinary, and so to arm him with a Plea, who can now do no more hurt or good, but only to be answerable to the Damages, which the Patron and Incumbent (which two must needs be named) will be sufficient to answer.

But if the Church be not full, but stand solely upon disturbance, then you must name the Ordinary, or else he will tollate (suffering the suit) by Lapse, which as if you name him he may either discontinue, and then you may have judgement against him, or else he must plead, and allow himself a disturber, and then you can have no lapse. But if he discontinue, and the Plaintiff will not take his judgement but maintain him a disturber and that he found against the Plaintiff, I hold (as I have heretofore holden) that the Bishop's collator hanging the suit shall not be removed; for he can have no judgement nor writ upon oblatione reclamatione Episcopi, because as against him he is barred.

Next in this Case I advise him to name no more disturbers, then are likely to have reasonable titles: For, every disturber will make a several Title, and therefore, confess and abate the plaintiff's title, whether he himself have good title or not; so it were better not to name them: For, they can but present; and yet these Clerks in hanging the suits, which will be removed by the writ to the Bishop, if their title be not good; but such as have reasonable titles are fit to be named, that their titles may be discussed directly at the suit of the parties, and not left to an after game, the title to be tried between the Incumbent that comes in hanging the writ, and the Clerk that is admitted upon the writ to the Bishop. For I hold it cleare, that the Bishop cannot refuse to admit the Clerk of the party, that recovers and retains a Plenary upon another's presentation and right: For that is the way to confound all: For, if that return be false, it cannot be traversed; for there is neither party nor day in Court to controvert it. And if you say, the writ is only non oblatione reclamatione of the parties, and this is a stranger, I answer, that it is cleare, that the Clerk that came in, hanging the suits by the presentation of them that have no right, shall be removed: And shall the Ordinary (that is not recorded to plead to the title of Patrons, hanging the suits wherein he is made a Defendant) make himselfe judge of Titles after judgement (whereunto he is a stranger) to make it finally? As to a question, whether he shall be removed or not, I hold it cleare, that he shall be removed.

If you say, that he that hath recovered may remove the Clerk by Scire fac. I answer, that, that prevents not the state of an Ordinary, if the return be true, which it may be, because either there is no plenary, or not upon better title as he returns, whereunto there is no answer.

And againe, it is unjust to put one to a double suit, where the satisfying of the writ, is but Recensio juris, qui non habet injuriam, to give him possession according to his right. But if his adversary's right be the better, it hurts him not, but enables this Clerk to try his right, before without this admittance he could not. As in the case of Copyholders, admittances may be.

Now I will speak next to the Plea of Bishop the Clerk, and make that the second point, because it hath much affinity with the first point, that hath been handled, and the reasons of it. Herein first I agree, that the plea of the Incumbent is good. For he hath pleaded himselfe Patron Incumbent: and so make himselfe possessor de facto, according to the Statute, and hath also laid of whose presentation as he must, that it may appear to the Court that he retains his own title and his Patrons, whereupon his claim depends according to the Statute. Now though he be not in truth in, of the presentation of the thing as he pretends, but of the presentment.

2. Point.

Concerning  
 the pleadings  
 of Incumbents.



on of Taylor (who hath also pleaded so) yet it doth not appeare, which of those pleas is true, nor the plea of the one doth not estop the other, so that both are to be admitted.

Then, touching the replication of the plaintife, I hold it insoymall, for two reasons.

First, where he saies, he is not Parson inperforce of the presentation of the King, he should have indured it with alledging of whose presentation he was in, with an absque hoc, or else it may be that he is not Parson at all, and then he should have pleaded so, and not a Negative pregnant, as this is, as against a Fine, partes Finis nihil, &c. but such another.

Secondly, his conclusion should have been judgement if he shall be received to this Plea. But because both these are but soyme, the generall demurrer takes no hold of them.

Now where it was said that the Replication should have been, that he was not Parson inperforce generally, or modo & forma; because he is a possessor within the Law, of whose presentation soever: I hold the Replication as it is, very good.

First, if a man make his title more speciall then hee needs, in many cases his Adversary shall take advantage of it; For the Law shall conceive that he is best supplied of his owne title.

But in this case the Parson cannot plead that he is Parson generally, but he must shew necessarily of whose presentation, as all the Bookes and Presidents are. And yet that is not soyme, but therefore materiall because by the Stat. he must not only be a possessor, but he must (as hath been said) as well shew and defend his owne title, that is his Patrons whereupon his owne depends, as counterplead his adversaries.

Now then he must as well make it appeare to the Court that the title hee defends is his Patrons, as that he is possessor; for he cannot say that he is Parson of the presentation of Taylor, and make a title to the King as Patron, so it is materiall to set forth to the Court of whose presentation he is in, and by consequence it is traversable.

In a Quare Imped. you lay the presentation of the last Incumbent and you name him, yet it is alone to the matter whether it were he or another, so it were the same the Patron that presented, yet you shall traverse the presentation of the same man.

Now to the Plea of Taylor, which I make the third point. Wherein the case is thus. A man had a grant of three avoidances of an Abbotsion appendant made by him that was seised in Fee of the Manor, and Abbotsion. The Church holds and the Grantor usurpes, and then it holds the second time, and then another usurpes that was likewise seised of the Manor, and seizes it to the King, who makes a grant of the Manor, and Abbotsion in his verbis, &c. to the plaintife. De uberiori gratia &c. dedit & concessit eidem Wil. Elvis Mil. Manerium pred. cum pertinentiis ac advocationem Ecclesie pred. eidem Maner. spectat. & pertinent. per nomina Manerii de Sanby alias Samby, in Comitatu Nottr. Ac advocationem Ecclesie de Babworth eidem Maner. spectat. & pertinent. adeo plenè, integrè & in tam amplis modo & forma prout predict. Gervasius ea habuit tenuit & gavisus fuit in tam amplis modo & form. prout Manerium illud cum pertin. ad quod, &c. ac predict. advocatio Ecclesie, predict. ad manus ipsius domini Regis nunc devenerunt, seu devenire debuerunt ratione attincturæ pred. Gervasii aut in manibus ipsius Domini Regis tempore consecrationis earundem literarum patientium existerent, &c.

And then the Church avoids the third time and the Executor of the Grantor of the three Avoidances presents, and his Clerk is received, whereupon the plaintife brings a Quare Impedit.

This point yeelds two questions.

First, whether notwithstanding the Usurpation the grantee may nevertheless present again upon every avoidance, as if there had been no usurpation.

The second, whether the Kings grant (as it is) doth passe the Abbotsion for the last turn, for else if that avoidance were gained from the grantee, and so come to the King by the seizure and not granted again by the King, then judgement

To the firſt.

ought to be given for the thing. But my opinion is for the plaintife in both.

As to the firſt of theſe, it muſt be confeſſed that an uſurpation at the common Law, did ipſo facto, gaine the poſſeſſion, not only of the preſent avoidance, but of the whole ſtate of the Abbotſon againſt all the world; which is the reaſon that the laſt preſentation is alwayes to be answered in a Quare Impedi and the Law is the ſame ſtill in all caſes where the ſtatute of Weſtm. the ſecond hath not made alteration. And in this caſe if the Uſurpation had been made by any other, but by him that was ſeiſed of the immediate reſerſion in Fee, no man would have doubted: but that it had would have gained the poſſeſſion of the whole Abbotſon, which could not have been continued but by a writ of right which the grantee of the three avoidances could not have by reaſon of the feebleneſſe of his eſtate, nor the Reſerſioner in Fee ſingle could not have had it during thoſe three Avoidances, but after he might have his writ of right of Quare Impedi. If he were within any of the caſes, of Writ which in this caſe is not becauſe the reſerſion is removed and is not now in that Perſon that was ſeiſed of it at the time of the uſurpation, and ſo being but a right could not be granted.

All that is objected is this, that when he in the Reſerſion alrups upon his leſſee for yeares he cannot gaine the whole inheritance of the Abbotſon by wrong, and the new inheritance by wrong, he cannot gain out of a leaſe for yeares only. So for an impoſſibility in Law it ſhould worke but to gain that one avoidance, and leave the eſtate as it was before in the Leſſee, even as it was in the caſe of the thing when an uſurpation is made upon him, which is the only caſe in Law of that nature.

This is a conceit, and it is but a conceit. For of poſſeſſory things an expulſion may be made as well as a diſſeſſin. And therefore if a man makes a leaſe for yeares of Land, and a ſtranger put out the Leſſee, he doth alſo diſſeſſin him in the reſerſion. But if the leſſor put him out, there is no diſſeſſin committed, and yet the Leſſee hath loſt his eſtate and hath but a right to it, and that, whether he will or no. For though it be true, that when two are in poſſeſſion, the poſſeſſion is judged in him that hath right, for he only poſſeſſeth, though the other be in poſſeſſion too, and take along the Trees, Cores, or the like; yet, when the true owner is clearly put out and removed, then he hath no longer eſtate of poſſeſſion, but right only, and hath no objection to be in poſſeſſion, or not in poſſeſſion as that caſe ſtands, and therefore clearly he cannot now grant his Corne. And if the leſſor bring an action of debt for his Rent due at Michaelmaſſe, the Leſſee ſhall plead that he did enter upon him, and put him out, and he continued his poſſeſſion at the Terme; For, he cannot have Rent out of that Land that he himſelf poſſeſſeth. And if the leſſor after ſuch expulſion dyeth, the Land ſhall deſcend in poſſeſſion to the Heire and the Executors ſhall not claime that that was a leaſe, for a terme never beares a que eſtate. But it is true that there are certain caſes, wherein a poſſeſſion cannot be gained.

1. Firſt, for priviledge of perſons; For, the thing cannot be diſſeſſed, but all Intruders are but Trepſpaſſers to him, and if he will he may charge them by Actions of account, as Bailiffes, yet he may, if he will, bring a writ of Right of Abbotſon.

2. Another caſe is, in reſpect of the nature of the thing whereupon the wrong is committed. For, if a man receive my Rent claiming it as his own when it is not, and ſo feed upon my Common without Right, he hath neither diſſeſſed me of the one nor of the other; but if I ſhould bring an Aſſiſe, and ſo admit my ſelf diſſeſſed, and he make title, and ſo we are both agreed that the poſſeſſion is removed, then it is ſo by ſtation of Law & conſent of parties that was not ſo in nature.

A man cannot by wrongfull ſeiſin of a villaine in groſſe gaine either eſtate in his blood or poſſeſſion of his perſon, otherwiſe then as of a freeman by ſale in priſonment.

But an Abbotſon is one of the things whereupon uſurpation workes more violently then upon any other poſſeſſion corporall; And therefore, where upon diſſ. of Lands, you have poſſeſſory actions for remedy; in the caſe of Abbotſons, if

if an usurpation be compleate, with a plenarty of six moneths, you are bounden to pour to it of right.

And where it is objected, That the case is as good, as if the grant of the thres avoidances had been to thres severall persons, in which case it is conceived that the usurpation upon one had not bound the rest.

It is answered, that the case is not altogether like, because when al the avoidances are granted to one, he may by his aches prejudice himself rather then another.

But another and moze pregnant answer is, that which hath been given, that one Usurpation puts all out of possession.

So then the conclusion is, That Elvis by his usurpation having got all that was granted out, and having his owne Reversion in Fee simple in himselfe, and forsetting it to the King, the whole Avoidance is in the King in Fee simple.

Now follows the second question of the third great point, Whether this, being the third avoidance, pass to the plaintiffe by the Kings grant.

Wherein first it must be confessed, that though the whole avoidance, were at the first Appendant, yet the thres avoidances were by the grant made in grosse.

Next, if this third avoidance were in the King in grosse, I am of opinion that it doth not passe from the King for two reasons.

First, that the Kings grant is expressly of the Avoidance as appendant, and therefore if it be in grosse, the King is deceived; For in the case of Appendency it passeth but as a part in effect of the avoidance, therefore if the King grant the avoidance as largely as Elvis had it, it would passe without specciall naming. But if it be in grosse it is as severall grants of severall things, which differs both in letter, and in effect, and in meaning.

Secondly, (which makes it moze cleare) if the King had this avoidance in grosse and the Reversion in Fee Appendant, as it alwayes was, then the Kings grant works upon the Reversion Appendant without touching the grosse, and amounts to no moze but a grant of so much of the Avoidance as is appendant, like to a grant of the avoidance, of D. in D. But now, I hold that the King had not two estates in this Avoidance, but one onely conjointed, and consolidate of the rightfull reversion, in which the possessory estate is drowned and extinct. The rather because there is neither right left, nor means of a recovery in the grantee, so that it is in effect as much as if the grantee had surrendred or granted the avoidances unto the Reversioner. And therefore take the case of 9 H. 7. That he in reversion disses his Tenant for life and dyes seised, this is a descent to take away the entry of Tenant for life, (But I hold it shall not take away the entry of a stranger) because as to him it is but the estate for life still, and but a flatious, and not a true descendable estate. For a grant to I. S. and his heires during the life of I. D. is no fee but a speciall occupant, as is resolved in Chudleighs case, but a disseisin of an estate for life by a necessity in Law makes a quasi fee, because wrong is unlimited, and ravens all that can be gotten, and is not governed by termes of estates, because it is not contained within Rules. So likewise if the lessor ejects his Lessee and dyes, the possession descends to the heire of one joint estate, and yet the right remains still to the Lessee. And in both these cases if the lessor grant the reversion, the grant is void, for, there is no Reversion. And yet it was stronger if the Lessee for yeares or Lessee for life after such diss. and expulsion by the reversioner should release unto him. And the principall case is in effect as good where the right of the Grantee is none in Law as hath been said.

And note that two Fee-simples that may stand in severall persons distinct when they meet in one person cannot do so, but the greater and absolute Fee doth swallow up the base and limited fee. So it is adjudged in Hosley's case, Hillar, 40 Eliz. in the common Pleas cited in the case of Alton Woods, Co. lib. 1. fol. 49. which was, that Charles Duke of Suff. was seised of the Avoidance of Welborne in the County of Lincolne in taylor the reversion to the King in Fee: And the Duke by deed inrolled granted the Avoidance in Fee to the

Obj.

Answer 1.

Answer 2.

The second question of the third great point.



King, and then the Statute, 24 H. 8. cap. 21. of Confirmation in Patents was made, and then the King granted the Abbotsdon in Fee to another, and it was adjudged a good grant; For, the King had not two distinct Fees, but one only made of two conveyed and consolidated together; And so is Aullins case, 1 & 2 Ph. & Ma. cited in Wallinghams case, fol. 560. which was thus. Sir Thomas Wyar being Tenant in Tale, the reversion in the Crown, made a Lease to Aullin, rendering a Rent and dyed. Sir Thomas Wyar the sonne accepted the Rent and was attainted of Treason and put to death, leaving Arthur Wyar his sonne. And it was adjudged that Aullins Lease was void. For though it were made good by the acceptance of the Rent, yet by the attainder the estate tale was barred, and extinct, as if Wyar the person attainted had dyed without issue, and so the Land came to the King in point of Reverter, and then the taking of a Lease would not proscribe a Lease that was in Law ended, and determined. Which had been otherwise if a reversion in Fee had been in any other, and not in the Crown; I hold the Law to be thus, if Tenant in tale and the reversion in himselfe be attainted of Treason.

In the argument of this case the Judges spoke publicly, and at large. The whole Court agreed una voce upon the first and second great point.

Jpp. Selse, Warburton and Winch, did also agree as supra. But in that only Hutton differed; and so judgement was given for the plaintiffs.

Star-Chamber.

Dame Sara Darcy, Clement Cooke Elqueir, Plaintifes  
Vers. Robert Leigh & alios defendants.

**T**he case was that Sir Robert Langley, Knight, being seized of divers Lands in Lancashire had issue divers daughters inheiret one was called Katharine, and he so seized, conveyed certaine Lands to the use of the said Katharine in tale, the Remainder to his own heires, and dyed; Katharine was married to one Leigh, and in Lent 13 Eliz. Leigh and his Wife suffered a common recovery of these Lands at Lancashire, to the use of Leigh, and his Wife, and the heires of Leigh, and in that recovery, Leigh and his Wife appeared by Attorney, and after dyed without issue, (but had had issue by her Husband) so that he was every way to be Tenant by the curtille, and then he dyed 29 Eliz. having bequeathed the Land to this defendant Leigh, being (as it is said) his heires some against whom the heires at the common Law brought a writ of Error, Assigning for error that Katharine was within age, at the time of the Recovery, whereupon issue being taken, it was found for the plaintiffs in the Writ of error, Anno 43. Eliz. the defendant being present, which failed by discontinuance.

And in another like tryall in another Writ of error, thirteenth years of the King which passed likewise against the defendants by default, and that also failed by the death of some of the parties. And now seventeenth Jac. upon a third Writ brought by these plaintiffs being heires to Langley against the defendant; a Jury being charged again upon the said issue of Sonage, and the Evidence given at large on both sides, the plaintiffs became convicted and brought a new Writ of error, and also exhibited this Bill into the Starre-Chamber against one Chatterton, Whitehead, Tenclos, and Booth, charging them with perjury in their depositions in the said tryall as witnesses for Leigh, and against Leigh for subornation of the perjury.

Perjury against Whitehead was assigned that he deposed directly that Katharine was of full age at the time of recovery. Against Chatterton that he deposed himselfe to be 70. yeares of age. And against Tenclos, and Booth because they affirmed his age so. And against Booth an other point, that he deposed at this tryall, that he had not been formerly deposed in the case.

This case was heard three dayes namely upon the merits, that is, whether these deponents or any of them were perjured or no. For it was agreed by the Court the Bill being leyed so, though there had been proofs of undue preparation of the witnesses (which is punishable though their testimony were true) yet it could

could not be brought to sentence upon this Will.

Touching the perjury was produced for the parties of the plaintiff the Office after the death of Sir Robert Langley which was found 20 January 4 Eliz. whereby it was found (the Jury being Esquires, and Gentlemen of good quality) that Katharine at the time of the taking of that Inquisition was of the age of eight yeares and a halfe, and two moneths and seven dayes, and no more in these express tearmes. So then she must be borne the thirtieth of May 7 E. 6. who dyed in June after, and therefore could not be 12 at the time of the Recovery. There were also other proofes of depositions pro & contr. for the plaintiffes and defendant.

Whereupon the cause being brought to sentence, it was holden unfit for the Court, and therefore left absolutely to the tryall at the Common Law, without descending at all into the merits of the cause, to avoid prejudicing the tryall, and without so much as referring the perjury to the Court, if the tryall at Law should passe for the monage.

The reasons whereof were as follow.

It was said there were causes that originally and in their own nature are criminal, and proper for this Court, as Rites, forgeries, embracing of Juries, preparing of witnesses and the like, which are all faults punishable here, bee the title good or bad. These are fit for the Court whensoever they come in; But there are causes also examinable in this Court which depend upon a question originally, and directly civil, and so are faults, and not faults, so that civil question of title is in truth on the one part, or the other.

As for example in this case, the perjury of Whitehead merely depends upon the title, and that depends upon the Age of Katharine, so that properly, primitively and directly, the question is merely civil, and determinable at the Common Law, and the charge of perjury is as if it were taken for granted, that Katharine were within age, which is *Quæstio alterius fori*, and sub iudice, under tryall in his proper Court, so that this is a way by policy, by an oblique manner to barre and determine titles in this Court, and by a kind of prevention to take the office of the Common Law and Court civil out of their hands; For if Whitehead in this case shall be condemn'd for perjury, shall not this sentence in effect, perjure as many as should afterwards depose the full age of Katharine, and so choake both title and tryall at Law. Which may beget an insufferable inconvenience; For so, upon the first tryall in every title, the party against whom it shall passe, may draw all the witnesses in question in this Court for perjury. And so all his witnesses standing upright may contradict the truth of perjury. And this case was yet made the more unfit for this Court by the circumstances.

First, that the question was of so old date, of almost 50. yeares, though it were true that it could not be questioned during the life of Leigh, the Husband of Katharine.

Secondly, that the possession of the Land had gone all the whiles according to the recovery.

Thirdly, that the tryalls and Monitions, had been pro & contra, and the depositions of witnesses both wayes, and the question depending upon comparison of ages, and other circumstances and inferences of much subtilty and uncertainty, which were proved, and disproved by persons, some as young or younger, sets or none as old, or elder then Katharine of whose age they spake. Whereas I observed the wisdom of the Common Law did allow none to be a Jury man in an estate probanda, that was not 42. yeares, for he tryed things 21. yeares past, and is not to be a Jury till he be 21. yeares.

Lastly, there was a sort of error then depending, wherein the title was to be tryed in his proper Court and course, which it was no reason to preiudge by the sentence of this Court, the rather because it appeared to the Court to be a question fit to be fitted by hearing and viewing of the witnesses, and weighing their credit and certainty of their testimony, and confronting of them as there should be cause, and applying apt and sodaine questions by an intelligent Judge,

for which they could not be prepared. All which advantages are wanting in depositions in paper.

And this Court hath two liberties which they use to very good purposes.

The first, where Jurors must of necessity give a verdict, they may leave their sentence with a Non liquet.

The other, they may send the cause to another Court, to which it more properly belongs, and either absolutely dismiss it hence (as here they did) or refer the crime after the civil part is ended.

Replevin.

*Steed Vers. Hartley.*

Tr. 18 Jac. Rot. 399.

STEED brought a Replevin vers. Hartley for taking his Cattle at Ballenden, at the place called Steeds-house. The Defendant makes confession as Bailiff of Walter Hauksworth, in loco, &c. And says that the said house is holden of the said Walter as of his Manor of Ballenden, by rent &c. And that for the rent he did distrain. The Plaintiff doth plead in bar, that the place is out of the Fee of the said Walter, whereupon this was taken, and found for the defendant. And Haris moved in Arrest of judgement that the Ver. facias was de vicineto de B. only where it should have been also de vicineto Manerii de B. But the Court gave judgement for the Plaintiff. For in an indifferent case the Court shall never presume, That the Manor, is larger then the Town: to de- feat a verdict.

Case.

*Clerke Vers. Wood.*

CLERKE brought an action of the Case against Wood, and declared that he was seized of a messuage in Fairfield, and prescribes to have Common and Pasture in seven Acres of Land there, and likewise to have a way from the said messuage, over the said seven Acres to Buntingford, and that the Defendant had ploughed up the said seven Acres, whereby he lost both his Common and his way: The defendant pleads not guilty, and verdict found for the Plaintiff. And Jones moved that the issue was from F. only where it ought to have been also from B. because he could not be guilty except there were such a way. And if the issue had been upon the prescription for the way the issue must have been from both. But yet the Court gave judgement because the point in issue appearing and direct is upon the disturbance, which was only in Fairfield where the seven Acres lye.

*Reynolds Vers. Buckle.*

Tr. 17 Jac. Rot. 862.

NEER Reynolds & Buck, in an Action of Debt, the plaintiff declares upon a demise for Rent.

The defendant pleaded that before the Rent due the plaintiff did enter upon him, but did not say, that he did expell him or hold him out, and so issue was taken Non intravit and found for the defendant and judgement was given for him; For though the Plea in bar was insufficient, yet the verdict was full to the issue.

Case.

*Poland Vers. Mason.*

Hil. 17 Jac. Rot. 1938.

POLAND brought an Action of the Case against Mason, for these words, I charge him with Felony, for taking of money out of the pocket of Henry Stacy: after verdict for the plaintiff for the insufficiency of the words, querens nihil cap. per billam,

Powell



Powel Verſ. Wind.

Caſe,

**P**owel an Attorney brought an action of the caſe againſt Wind for theſe words, I have matter enough againſt him, for ſp. Hartley hath found for-gery and can prove it againſt him. Upon this not guilty, and found for the plaintiffe he could have no judgement.

John Nevill Verſ. Yarwood.

Information

Tr. 18 Jac.

**J**ohn Nevill exhibited an information againſt Yarwood, for uſing the trade of a Baker againſt the Statute of 5. The defendant by Henden Serjeant, pleaded that this uſage of the trade was in ſuch a County, and that by the Statute 31 Eliz. it ought to be tried and tryed in the ſame County at the Quarter-ſeſſion of Aſſiſe, and not in any wiſe out of the County. And the opinion of the Court was ſo.

Sherley Verſ. Underhill

Q. Imped.

P. 18 Jac. Rot. 1057.

**G**eorge Sherley Baronet brought a Quare Imped. againſt Underhill to prevent it to the Vicarage of the Church of Sether Evington in Com. War. the tryall was had by Niſi prius, for the plaintiffe, judgement given by the Juſtices of Aſſiſe in theſe words. Iden conceſſum eſt quod præd. Georgius recuperet verſ. præſat. def. præſentationem ſuam ad Eccleſiam præd. & quod habeat breve Epifcopo ad admittendum clericum ſuum ad Eccleſiam præd. The defendant brought a Writ of Error, reciting quia in Recordo &c. inter Georgium Sherly mil. & Baronet, & præd. Underhill Error, &c. Whereupon the Record and proceedings were ſent into the Kings Bench, and a Pittitur entered upon the Roll here, and error aſſigned in the Kings Bench. And now Harris and Henden moved that the Record was not removed becauſe the writ of error was brought as well as Baronet, ſo not the ſame perſon which the Court ſhould agree.

Then they moved that the Record of the judgement, might be amended according to the writ, quod recuperet præſentationem ad vicarium Eccleſie præd. &c. which was alſo granted and amended, accordingly. Though it was objected, that the judgement was not given by this Court, but by the Juſtices of Aſſiſe.

Upon this caſe was ſhewed ſome Precedents, viz M. 33. & 34 Eliz. in B. le Roy. between Thomas Wyld plaintiffe, and John Wheeler defendant, and the judgement was quod recuperet verſ. præſat. Thomas Wheeler, and it was amended in the Exchequer Chamber after a writ of Error. And the like Hillar. 42 Eliz. between Stephany and John Morgan Wolfe, and the judgement was quod recuperet verſ. præſat. Morgan, and it was amended in another Terme.

Scot verſ. Lawes

Debt.

**S**cot brought an Action of debt againſt Lawes Clerk upon the Statute of 21 H. 8. the Writ was præcipe Willielmo Lawes quod reddat nobis & Johanni Scot qui tam pro nobis, quam pro ſeipſo ſequitur 10l. quas nobis & præſato Johanni debet &c. and declares for taking to ſarme 60. Acres of Land, and holding the ſame ſixe moneths per quod Actio &c. for ſixty pound, and further for taking to ſarme other Lands and holding the ſame ſixe monthes per quod Actio &c. for ſixty pound, the defendant pleads quod ipſe non debet præſato Johanni qui tam &c. præd. one hundred and ten pound, nec aliquem inde denarium in forma quâ &c.

Whereupon issue, and the Jury found that the defendant did owe thirty pound, and for the rest, quod non debet. Henden in arrest of judgement tooke two exceptions.

First, that the verdict expresses not for which summe, nor for which of the months the thirty pound was due.

This exception was not regarded by the Court, because the demand and issue was for one hundred and ten pound in generall, though it had been more so small to have distinguished better.

The second exception was, that the defendant hath not Answered the writt and declaration; For the Plea ought to have been as the demand is, Quod ipse non debet dicto Domini Regi, & prefato Johanni qui cam, &c. which the Court regarded the rather because the Statute of Jeofailles excepts penall Statutes.

## Prohibition.

## Hughs Case.

Mr Thomas Hughs of Grayes Inne prayed a Prohibition by Henden Serjeant, because hee being of counsell with the defendant, in an Action upon the case, for saying the plaintiffe had murdered three Children; whereunto the defendant pleaded not guilty. And at the tryall Hughs to extenuate the damages for his Client, did urge and press the Fact, to make the matter probable so farre as might tend to the defamation of the plaintiffe. And because it was in his profession and pertinent to the good and safety of his Client, though it were not directly to the issue, a Prohibition was granted.

## Badhams Case.

Pal. 14 Jac. Rot. 1014.

## Ejectione.

Ejectione firmæ, by Badham of the demise of Benjamin Crockley, for land in Glouc. The defendant pleads not guilty and proccesse continued against the Jury, till a writt of distringas cum octo talibus was awarded return. octabis Hillar. 17 Jac. at which day Richard Tripets of Dersly, was returned one of the tales, and the Jury made default, whereupon a distringas cum sex talibus, was awarded return. mense Pasche. 18 Jac. And at the return Richard Tripets was named as well in the writt of distringas as in the Pannell Tales, & by that name was sworn with eleven more, and verdict given for the plaintiffe. And upon exception taken the Court required proofs that it was the same person. And at last the undersheriffe of Glouc. that made the Return but was now out of his Office (a new sheriffe being chosen) towards the end of Mic. Terme 18 Jac. deposed in Court, that he knows not the man, neither that he was one of the twelve that gave the verdict, but yet affirmed, that there was a Rich. Tripets of Dersly in his Free-holders book but no Tripets. And two other strangers deposed that they know Richard Tripets of Dersly, and that there was no Tripets there, & that Tripets was the man sworn of the Jury, which they know because they saw him sworn being about the Court by accident, and some writing was also shewed proving his name Tripets; whereupon by Order of Court, the Writt and Pannell was made, Tripets, and judgement given for the plaintiffe, for damages only, for the terme was ended. And the entrie of the rule is in the bill of pleas of sp. Brownloc, by Othogaire, the secondary, 16 Novem. 18.

The Writ and Pannell amended.

Clanrickard

Clanrickard Vers. Lisle.

**I**Nter comitem Clanrickard, and Francis his wife demandants and Robert Liffcount Lisle in the Forzmedon befoze entered, judgement was pronounced 16 Novem. 18. and a writ of error was brought by the Earle of Leicester tenant, bearing teste 17 Novem. and then allotted and in majorem cautelam a Superfedas made against executions, and yet the demandant obtained a writ of seisin bearing teste nono die Octobris befoze by warrant of the judgement which was afterwards entred, but as of Octab. Mich. being the last continuance, which being opened to the Judges, and they well knowing that judgement was not pronounced till 16 of Nov. so that the tenant could not have a writ of error befoze, neither ought the demandant, to have a writ of seisin befoze; so by this trick any writ of error, might be defeated as to saving possession. And therefore a nati Superfedas was awarded against that writ of execution quia erronea &c.

Barker Vers. Cocker.

Mich. 18 Jac. Rot. 603.

**P**eter Barker Vicar of Stower Payne did libell in the spiritall Court for tythe Lambes against Robert Cocker, and said that there was a custome there, that all Lambes ingendred faine and bred upon any one Tenement or living in the same Parish, although they belonged to severall owners they have been call and reckoned together, as if they were but one mans, and the tenth of tythe Lambes of them so counted together have been paid for tythe.

Whereupon Henden prayed a Prohibition because all customes against common right are treble at the common Law. Which was granted. And the Court was further of opinion that the pretended Custome was unreasonable and against Law; For by this meanes it might fall out that some one might have but one Lambe, and that might be taken for tythe, and hee that had more should pay nothing at all.

Somersetshire.  
Cur. Spir.

Lambes of severall owners reckoned together an unreasonable custome.

Ersfields Case.

Fine.

**S**ir Thomas Ersfield conveyed to his eldest sonne (whom he did in effect disinherit) the Manor of in the County of for terme of his life the remainder to a younger sonne of his by a second wife in fee. Both the brethren did bargain and sell their severall estates to Sir Edward Sackville and the younger brother was to have for his remainder one thousand five hundred pound whereof he received three hundred pound in hand and for the rest he had taken assurance, and then he and his eldest brother acknowledged a note of a Fine of the Land befoze me, and then the elder brother died. Whereupon divers motions were made for the proceeding and staying of the Fine, pro & contra. And I was of cleare opinion that the Comtee might proceed with his Fine against the younger brother only and take his Writ of covenant accordingly. For the death of the other is no impediment, for the cognisance of ebery one is against himselfe, and shall worke for so much as he can passe. And so it shal be passed but that Sir Edward Sackville was contented that the younger brother should have the Lands paying certayne Debts of the elder brothers, and upon other agreement, so the Fine was stayed by consent.

Motions for proceeding & staying of a Fine.

Farmers



Fine.

## Farmers Case.

**O**ne Farmer and his wife, acknowledged a note of a fine the twenty five of March 1621. before Comm. by Dedimus potestatem, and the wife dyed the twenty seventh day of the same month. The twenty eight day composition was made in the Alteration office upon a Writ of Covenant, made returnable in Hil. terme, before, and the Kings silver was entered in the office of the Kings silver, as of the same Hillary terme, and so the fine was passed, and ingrossed, and now in Easter Terme, the heire of the wife moved against this fine, but upon debate the Court resolved that the fine must stand.

Tr. 17 Jac. Rot. 2159.

**A** Party of both Counties of Bedford and Hertford came to the Barre this terme, and first was swoyne one of the one County, and another of the other County, and so in order, till one of the County of Bedford was challenged, and then the Court proceeded to the next of that County, untill one were swoyne, and so of the other County, untill five of each County were swoyne; For, if there should be five swoyne of one County first, and five of the other afterwards, it were disorderly and Erroneous.

## Wilson Ver. Stubbs.

**M**Armaduke Wilson, brought a writ of second deliverance against Ralph Stubbs, and after verdict and here at the barre an. 18 Jac. had judgment to recover costs and damages amounting in the whole to sixteene pound, and had a Capias utlagat. directed to the Sheriffe of Yorke to take the said Stubbs in execution for the said damages, and after the same terme of Saint Michael, one Ralph Stubbs the younger brought a writ of Idempnitare nominis, unto the Judges of this Court, and had a Superfed. to the Sheriffe to forbear any execution against the said Ralph the younger. And the Court was often moved to maintain the writ of Idempnitare nominis. And diverse presidents shewed in this writ, brought in case of Outlawry where one was taken upon a Cap. utlagat. for an other of the same name, vide Pascha 36 H. 6. Rot. 411. per Johan. Skiers, de Northbury in Com. Somerset Junior, ad secta. Ro. & si feme & tiel brich, de Idempnitare Nominis, directed to the Judges; and Sureties put in by the said Skiers, qui manuceper. corpus pro corpore. And thus taken by the Attorney Generall, quod est eadem persona, and verdict (as before) against the King, and the like judgement. The like in Mich. 3 H. 4. Rot. 214. was a writ awarded to the Sheriffe of London, to enquire si eadem persona, which did returne that he is not the same person, and judgement as in the first.

And notwithstanding these Presidents, the Court was of opinion that the writ in the principall case, and the Superfed. thereupon was not warranted, but that the defendant Stubbs the younger might have his Action of false imprisonment; For, that the defendant, being named Ralph Stubbs without addition, shall never be accounted the younger but alwayes the elder of the two of that name. Nevertheless for avoiding of duplicity of suits, it was ordered the defendant Wilson should appeare to the scir. fac. Upon the Idempnitare nominis, and plead and goe to tryall, and if upon tryall he was found to bee the same man, then the money remaining with the Sheriffe to be delivered to Wilson, vel contra si, &c.

The

The Court did take a great difference between the caſes of the Outlawry, and the principall caſe being onely at the plaintifes ſuite, and not at the Kings as in every Outlawry the King is intereſted, and of which principall caſe no preſident was or could be ſetted, Vide Long 5 Ea. fol. 84. of the 2<sup>d</sup> ed.

Clark verſ. Gilbert.

**C**oddard Clark brought an Action upon the caſe againſt Gilbert for ſpeak-  
ing theſe words; Thou art a thiefe, and haſt ſtolne twenty loads of my  
ſarje, and upon that gilty, a verdict was found for the plaintiffe. Now it was  
moved by Serjeant Hicham, that theſe words bore no Action, becauſe the ſarje  
might be ſtanding and ſelled and carped away by the plaintiffe, and ſo no ſarje.  
And Athol of counſell for the plaintiffe urged, that it ſhall be underſtood  
rather of ſarje ſelled then ſtanding, and alſo the words are ſo coupled, that the  
laſter are not made a reaſon of the former, but either of them a ſufficient reaſon  
ſtanding of it ſelfe. And ſo the word Thiefe is ſufficient alone. And ſo that  
purpoſe cited (as he ſaid) others caſes all in B. R. one between Minors and  
Hieſford 4 Jac. and another between Eire and Conſtable 7 Jac. and another be-  
tween Turner and Campion 13 Jac. but he relied chiefly upon a Record in  
the 2<sup>d</sup> Jac. in the Kings Bench between Kelham and Maſſy, where the  
words were; Thou art a Thiefe, for thou haſt ſtolne my Coine, and judgement  
was given for the plaintiffe. All which notwithstanding the Court here after  
others motions and debates gave judgement againſt the plaintiffe. For as to the  
firſt point it hath been often ruled; That it is all one in Common Law and  
acceptance, whether it be (And) thou haſt ſtolne, or (For) thou haſt ſtolne.  
And in the caſe of Kilham the Court deemed the Laſt to be ſo, except there were  
ſome further words of explanation, as Coine in my Barre, for the like. For  
otherwiſe in words indifferently the more on the laſt, and ſufficient from  
the more ſignificant charge ſhall be taken. And therefore we have given judg-  
ment before ſupra, between Coote and Gibert, againſt the plaintiffe, upon debate  
where the words were; Thou art a thiefe, and haſt ſtolne my Tree.

Hanſon & Norcliffe.

Hill. 18 Jac. 1861.

**H**anſon plaintiffe, and Norcliffe defendant, in an Action of debt the plaintiffe  
declares upon a Leaſe for yeares made by him to the defendant, reſerving  
Rent, and for the Rent behind the Action is brought, the defendant pleades that  
the Leaſe in the Count mentioned, was made by Indenture, reſerving the Rent  
prout and with condition, that if the Rent be behind, then the Leaſe ſhall be void,  
and doth alledge a default of payment of the Rent, and ſo the Leaſe determined.

The plaintiffe demurreth in Law, and it was reſolved by the Court that this  
Leaſe is not void without a demand, which therefore the defendant ſhould have  
laid actually. And for want of it his Plea was bought. And ſo it is at the  
pleaſure of the leſſor, and his heire to continue or abſolve the Leaſe in ſuch caſe.

Amphurſt & Palmer.

P. 19 Jac. Rot. 2048.

**T**he ſame caſe between Amphurſt and Palmer, was in like ſort reſolved:  
And the Rent is due without demand, but the ſoleſſors of the eſtate,  
whether by Entry, nor by abſolving upon condition is given either for leſſor, or  
for leſſee, without due demand made, which muſt be expreſſely laid in  
pleading.

Mich. 19 Jacobi. Regis Rotulo. 763.

Brownlow.

**I**n an Ejectione Firmæ by

against

The Case as to one great point was thus.

Mackwilliams the husband makes a feoffment of the manor of Bathorne, to Osborne, to the use of himselfe, and his wife, and the heires males of their two bodies, the remainder to the heires males of the body of the husband, the remainder to the heires of their two bodies, the remainder in fee unto the husband.

They have issue a sonne and a daughter, the husband dyeth; The sonne maketh a Feoffment by Adventure to beguine after the death of the mother, rendering a Renti; and then by agreement leaseth a Fine with proclamations to the use of himselfe in fee, and death without issue: The mother by assent of the daughter, and her husband, suffers a common Recovery, in which the daughter and her husband came in as Purchasers; The use of which Recovery, is, to the use of the mother for life, the remainder to the daughter and her husband in tale, the remainder in fee to the daughter: the mother dyeth.

The question is, whether this lease of the sonne, under whom the plaintiffe claims, be good against the daughter, and her husband, under whom the defendant claims.

And it was advanced for the defendant by the opinions (upon solemn argument) of Justice Jones, Justice Hutton, and my selfe: But Justice Wiche was of opinion, that the Fine of the sonne, though in the life of the mother, (before whom he dyed without issue) should bind the daughter; and all claiming under her.

Now first it is to be observed that the estate taylor to the husband and the wife, and the heires males of their two bodies, after the death of the husband, was wholly in the wife at the time of the fine leaseth, though the wife was then in the Statute of 32 H. 7. When the remainder to the heires males of the body of the mother, was leased in the house at the time of his Fine leaseth, but both these estates taylor were extinct when the sonne, and the mother were dead: So the lease could not stand by those estates; Then next succeeded the remainder to the heires of the bodies, of the heires of the husband and wife, which after the death of the husband was wholly vested in the wife, to which both the sonne and the daughter were inheritable, being brother and sister.

Now the Question is, whether the Fine of the brother, (being the first issue of this intayle) leaseth in the life of his mother, (who was sole tenant of that intayle, and his issue (the him) shall have his sister, to whom the land so intayled descends immediately from her mother.

And two held that it should not.

In the argument of this cause I said that he that will make a good confutation of the Statute of 32 H. 8. must make it upon a just consideration and conference of the Statute of 4 H. 7. and it together; The first being the Act and the other but a Recapitulation in a few words made, but little differing in substance: For he that shall observe the strongest cases, that have been ruled, of giving, or binding, having, extinguishing, or discharging, (to use all the words) of intayles, by fines with proclamations since 32 H. 8. shall say, that the same cases ought to have been so ruled upon the Statute of 4 H. 7. though the other of 32 H. 8. had never been made; But because intayles were so beloved, and had reigned so long, it was wisely borne of the Judges not to launch the Swoye too deep of themselves, but to have the Parliament mistress of so liberrall an exposition as 4 H. 7. requirer, and would well have borne. And therefore, 32 H. 8. amends all Fines, as well before, as after, leaseth according to 4 H. 7. to be of one and the same force, and effect. So the same upon 4<sup>th</sup> was ab initio, as strong against intayles, as 32<sup>nd</sup>. And in these cases the Statute of 32 H. 8. seemed to weaken the Statute of 4 H. 7. In the case of Fine by tenant in tale by act of Parliament, and tenant in tale with reversion in the Crown. For P. 28 H. 8. Fine by tenant in tale, the reversion by the Crown, bound the issue by 4 H. 7. and 32 H. 8. provides that the same Statute shall not extend to Fines leaseth by tenant



tenant in tale, the reversion in the Crown, but that the same shall be of the like force as they should have been if that Act had not been made, which amended not their case; whereupon in Staffords case the Judges desired to help that Act by a very oblique, and indirect strain upon the Statute of 34 H. 8. of common Recoveries whereby it was provided that no common Recovery in that case should bind the issue, but that he might enter after the death of the tenant in tale, the said Recovery, or any other thing done or suffered, by or against any such tenant in tale to the contrary notwithstanding. Co. lib. 8. 78. Staffords case, and Notley's case.

All persons are by 4 H. 7. concluded under the words Parties, and Strangers to the Fine, and the Statute hath bindings for Strangers, but none for Parties; And therefore the exception of, Parties Finis &c. is given to all persons not parties, nor parties; that is, only unto Strangers.

The word, Parties, in the purview of 4 H. 7. is the operative word, and contains as much as the many words in 32 H. 8. And therefore no man would have doubted upon that Law, of Grants case, Archers case, or Zouches case, for they are all parties to them that levy the fines, that is, party in estate and title to the intaille; for party in blood alone is nothing; and therefore Coke lib. 3. Lincolne Colledge case, If a daughter of a tenant in tale levy a Fine, and then a sonne is borne, proclamation shall not bind him, for he is a stranger, and may plead as a Stranger, Parties nihil &c. But in Archers case where the Grandfather and Grandmother were tenants in speciall tale, and the Grandfather dyed, and the father enters upon the Grandmother dyed; I hold that the sonne is to be barred by his fathers Fine, for though in the Foreclosure he need not make himselfe heire in tale to his father, because he was never father, yet he must necessarily being a Lineall heire mention him, and must convey himselfe to the intaille, by and through him; which is the reason given in the case of 18 Eliz. Dyer 351. that the Fine of the husband Count in speciall tale doth bind the issue, though the spouse survive.

But now in Lines amongst Collateral issues, and heires among themselves, which is the case now in question; the case is not the same, but it receiveth distinction according to contingency; for it is not necessary that the Collateral issue claiming by an intaille, must make mention of every Collateral issue inheriting before him, as in the case of Lineall ancestors it is.

And therefore make the case that the father being Tenant in tale to him and the heires males of his body have issue three sonnes, and the second sonne levy a fine in the life of the father, and then the father dyed without disposing the estate.

First, clearly the eldest sonne is not barred, because he is not a Party to his second brother, though he be within the Rigour of the words; for he is heire to him that levied the fine, and doth claime only by the intaille; but above him, and not as heire, which is the meaning of the Law.

Then again if the second brother dyed without issue in the life of the elder, or of his issue; the third brother shall claime this intaille after the death of the elder brother, notwithstanding the fine of the middle brother, because he doth claime immediately from his elder brother, and need not to convey himselfe by nor make mention of his middle brother, no not in his pedigree. But if the elder brother dyed without issue in the life of the middle brother, or his issue, without disposing the estate, and then they all dyed; now the third brother and his issue shall be barred; for though he may bring his Formedon in Descender, and lay downe the intaille, and then bring it to his eldest brother that was last seised, and make himselfe immediate heire unto him, without mention of the second brother; yet the Tenant in the Foreclosure, may plead the fine of the middle brother, and that he is his issue, doth bar him the elder and his issue; for by that it appeares that the issue of his issue, were the persons inheritable to the intaille before the younger brother, in whom the title of the intaille had been totally, but

but for the fine which bars him, and the whole intagle, as well against his younger brother, as against his owne issue. By which it appears that the fine bars, or bars not the younger brother, by contingency of surtise; or not lineages of either party. Wherof the reason is, That if after the fine of the second brother, the eldest had dyed without issue, and the father had dyed, the whole Tayle had been bound against all the brethren in the same manner as it were upon a fine amongst the brethren in fee simple.

And indeed the scope of the Statute of 4 H. 7. and 32 H. 8. is to make fines with proclamations, bar as amply in tayles, as in Fee simple.

But in all these cases though the fines bind these parties, yet strangers may save themselves and their rights by the plea. *Partes finis nihil &c.*

Note that this difference between Lincall and Collaterall betwix is well verified upon the same reason, 32 H. 8. Dyer 48. That if a man be seised of Land in fee simple, and his eldest sonne be attainted of Felony and dyed in the life of his father without issue, the second brother shall inherit immediately from the father; otherwise it will be if the elder brother, or his issue survive the father.

Error in  
Exchequer  
Chamber.

### Lord Sheffield Verſ. Ratcliffe.

13 Jac. Scacc. Rot. 96.

**D**e mercurii post Festum Sanctæ Margarete 17 E. 2. John de malo Lacu, gave to Peter de malo Lacu and the heirs of his body the Castle and Manor of Mulgrave. By many means Descents the Land came to Sir Ralph Bigod January 10. 6 Hen. 8. Sir Ralph Bigod made a feoffment to William Ewerard and others to the use of his last will and dyed, and the right of the Land together with the entails the use also after the will performed, descended to Sir Francis Bigod.

December 10. 4 Hen. 8. Sir Francis Bigod made a feoffment to John Conyers and others, to the use of himselfe and Katharine his wife, and the heirs of their bodies, and they had issue Ralph Bigod and Dorothy.

Then the Statute of 26 H. 8. cap. 13. of forfeiture for Treason, is made, 16 Maii 29 H. 8. Sir Francis Bigod was attainted of high Treason, committed 7 January, 28 Hen. 8. and was executed, and Katharine survived, 31 H. 8. the speciall act of Attainder of Sir Francis Bigod and his coheirs amongst others is made.

4 Nov. 6. Eliz. Ralph Bigod sonne of Francis and Katharine, was restored in blood by Parliament and dyed without issue, Dorothy married Roger Ratcliffe, and they have issue Francis Ratcliffe.

1 Octob. 8. Eliz. Katharine dyed, and Francis Ratcliffe entered 11 Aug. 33 Eliz. the office found for the Queen.

1 February, 34 Eliz. Francis Ratcliffe dyed, having issue Roger Ratcliffe.

28 Apr. 34 Eliz. the Queen by her letters Patents of the same date, granted the same ec. to Edmund Lord Sheffield and the heirs males of his body begotten at the rent of 90<sup>l</sup>. 18<sup>s</sup>. 3<sup>d</sup>.

Roger Ratcliffe upon this whole case, sued his *Mra. de droit*, in the Exchequer, and had judgement for him. Whereupon a Writ of Error was brought, and the Question is, whether this judgement ought to be affirmed or reversed.

The Questions are three.

1<sup>st</sup>; Whether Francis Bigod who had an estate in speciall tails in possession, had also any right of the old intagle left in him at that time of his attainder; 2<sup>d</sup>; whether it were not in him but in Abeyance in respect of the feoffment made by him, 21 H. 8. And whether that right did accrue unto the King, by the attainder of Francis Bigod, and the generall Statute of 26 H. 8. c. 13. or by the particular Act of 31 H. 8. which is to be considered.

And I am of opinion, That there was a right of the old intagle remaining in him, and that the King ought to have it, together with his estate tayle speciall in possession, freed and discharged thereof as long as the estate in tayle endures.

In the handling of this point, I shall occasionally speake of rights of Entry that

The 1 Quest.

that are given, or not given, and also of rights of Actions real, given or not to the King upon attainder of treason, by force of the Statutes or of the general Statute of 33 Hen. 8. Chap. 1. For this Statute is so heere of kinne to that constitution of the word (rights) that we we must foresee that we doe not in the judgement of this case prejudice the Statute Ex obliquo.

The second Question is, whether there be a Remitter in the Case after Attainder of Treason, and if there be such a Remitter, then when the Remitter began, how, and in whom (whereof nothing hath been distinctly said yet.) And I am of opinion, that there ought to be no Remitter in this Case to the old Intayle.

The 2. question.

And thirdly I adde further, that if there be any Remitter, it is but for a time, and by the Office following, it is removed and ended.

I must proteste that whensoever I have thought of this Case, and abided upon it with my selfe, I have met with two strong affections, Zeale, and Indignation. Zeale in behalfe of the King, to preserve the ancient rights of the Crown, against the Invasions of Rebels and Traitors. Indignation, when I finde Francis Bigod, that sometimes brought a puissant Army into the field to depose the King, falling in that interysse, now to rise up in judgement against him, What whom he could not by the sword destroy hee might supplant by the Law: For though Ratcliffe bare the name of this Case, yet I see nothing but the Land of Francis Bigod, his State, his Right and Title, his blood, his descent that maintaines it and defends it. Therefore let it not seeme strange that I am tourne in this Case; for, Zeale and Indignation are fervent passions.

And I doe proteste to give Privilege to the Rights of the Crown in my care and vigilance: And it is Nobile Officium Judicis & debitum, due by Duty and Office to watch for him, who wakes for us, ne quid detrimenti capiat Republica. And if charity begin at it selfe, so ought Justice to doe, What the King who granteth Justice to all, should not be wanting to himselfe.

Because I desire to be plain and cleare in my Argument, I will make the Questions as single as is possible: For, multiplex indistinctum parit confusio-nem; & quæstiones quæ simpliciores eo lucidiores.

Therefore I will make the first point a single Question (at the word for my part) But this; Tenant in Tayle, or Land in possession, makes a Feoffment in Fee. The Question is,

Whether any right of Intayle remaine in himselfe still against his Feoffment, and to what ends and uses, and what hee may doe or suffer by force of that right?

1. Point.

In this Question you see I doe thin to take any exception to the validity of the Feoffment made, by Francis Bigod, as cestui que use in Tayle, by the Stat. of 1 R. 3. and not then Tenant in Tayle in possession.

Yet notwithstanding, taking the cause at the worst, I am of opinion clearely that this Feoffment gives away all the estate the tenant in Tayle seoffed, had as concerning himselfe or any benefit that he may receive. But as concerning his issue inheritable to that in Tayle, and to him in the reversion, and for their good, there remaines still in him a right of that Intayle by force of the Statute of West.

2. for the good of those that are saved by that Statute, against his alienation.

Therefore note first, that it is contended on both sides, that there is a right remaining for their use and good, but whether it be the Feoffor himselfe, keeping till there be an heire to claime, or in no person but in the preservation of the Law, which some terme in Abeyance, or in Nubibus is the Question. By which it appeares, that the pretended exact enumeration of Rights, as Jus habendi, retinendi, percipiendi, possidendi, Intrandi, recuperandi & fruendi was needlesse. Whereupon they would inferre that this was no right, because it was none of those rights, and makes but mucker and nolle, for there is a right, and it is Jus recuperandi, when the time cometh. But where it is in the meane time till the person inheritable appeare, what may put this right in execution and practice, which the Feoffor cannot doe against his owne Feoffment, is the onely



onely Question; And upon this pretended exact division of rights, they have left out one whole member of Rights; For, where Rights are in a Dichotomy either *Jura lucrativa*, or *lucranda*, acquirendi, or *jura alienandi*, they have left out that whole latter branch, and onely particularised the *Jura lucranda*.

So all the waives and powers and rights, which by a man hath right and power to depart with that he hath and not to get or keepe, are omitted: Such as are the rights to give, to release, or *extinguendi* to extinguish, *ius renunciandi*, to renounce or disclaim. Of which kind, this very right that the tenant in taylor hath after feoffment, (which hath but discontinued,) finally to barre the whole intayle, is one. For this right that is left after his Fine or Feoffment, he may extinguish, and by that right the taylor may be recovered again, as by the roots of the intayle, that is left alive still.

Now see the reason of this; and let the Statute of Westm. and the pleading and practice upon the Statute, which are the expositors of Law, judge.

The Statute of Westm. rectifies the formes of Fines simples conditionall, which now are intayles, and then sheweth two mischiefs: That in all these Cases, the Feoffees after issue, had power to alien and and disinherit their issue, and also the Donors were likewise heretofore barred of their reversion, both being against the mindes of the givers, and forme of the gift, and holden hard, *Durum videbatur &c. Durum id est iniquum*, and the remedy provided is only in these words.

It is ordained, that the will of the giver, (according to the forme in the deed of gift expressed,) shall be from henceforth observed. So that they to whom the Land was given under such conditions shall have no power to alien it, but that it shall remaine, to their issue after their death, or shall revert to the giver so want of issue.

And if a Fine be levied of such Lands, *Finis ipso jure sit nullus*, he shall have no full and absolute power to alien or lay a Fine. But though neither fine nor feoffment be void, yet they shall be voidable, not as before, when they bound absolutely both heires and Donors.

So that it appeares, That whereas before this Statute, the Feoffees had absolute power to alien after issue, and finally and totally and in a sort rightfully, being in a sort not against any rules of positive Law, so barre to all purposes as well against his issue and the giver, as against himselfe. Now, that very power of alienation remaining as against himselfe, is restrained and weakened, so do that that finally shall bar his issue or the giver expressly, and him in the remainder, by equity, though he may still disturbe and discontinue it against them by expositions, which the Statute hath received, which as Littleton saith, Ch. 71. Discont. reasoning out of the Writ, which saith, a Tort luy de force, is a wrong and wrongfull Act, so that whatsoever conducteth to recovery of the issue or the giver he is restrained of his power that he had before to barre it.

So upon this Statute, I reason thus. A Tenant in Teyle hath the whole estate in Teyle, and all the right of it in himselfe, and may finally and totally bar it, as well against his issue, as against himselfe by a common recovery, notwithstanding this Statute, but by a Feoffment or fine he could not by reason of this Statute.

And therefore, that chiefe and meere right, *summum* or *merum jus* intayle (which though it be discontinued, is not barred by the feoffment) remained where it was not aliened, (i.e.) not made alienum, for it is not in his power by that kinde of conveyance, and *a non posse ad non esse sequitur argumentum necessarie negative*, though not affirmative, that which cannot be done, is not done, so that the argument stands thus, What the Tenant in taylor had, and hath not parted withall, remaineth in him still, but the maine right in taylor he had and hath not parted withall, therefore it remaineth in him still. For *Qui non habet potestatem alienandi, habet necessitatem retinendi*. If you say he hath parted with all, I prove he hath not because the Stat. hath taken from him the power to do it by fine or feoffment, only, *Finis ipso jure sit nullus*, which before he could have done.

Now

Now the practice of law hath been answerable to this, both to the De-  
not, and to the De. The De. hath the things wherein he may be  
benefited by prescription, one in his count referred upon his gift, the other in his  
verber the De. only in his descent. Now for the De. when the De. hath  
made a feoffment and hath retained himself from the use of all rights re-  
turning himself, yet the De. shall by force of the Statute, which he could not  
at the Common Law, retain upon him self, as the Statute of the Land, 28 E. 3.

And if the De. hath retained all his right in the De., that  
hath discontinued, this retains, though it will strengthen no right to the very  
Land, yet it will strengthen the De., which is good, that the De. cannot by  
his feoffment himself himself of his whole right, but that by the Statute of  
Wellm. his retention is sufficient as to that as concerning the De., which is  
by the equity and meaning of the Statute, in the point of Retain for rent.  
But whatsoever the tenant in fee suffers a recovery, or leases a fine, at this  
day, the Abbotry together with the right of the tenant will cease.

And the answer as to that is important, to referre it to the Case of a Tenant  
in fee simple, that hath alien, and yet the Land may still stand upon him. For  
the Cases have no resemblance. For as Littleton hath distinguished. If a Ten-  
ant in fee simple when he hath imparted with his whole estate, is no longer  
tenant to the Land in right, neither can he compel the Land to stand upon him  
though the Land may if he will stand upon him for his arrangements. And if the  
Land retains unto him all his right in the Land, the retains to hold to discharge  
rents and services, shall hold it from the Statute, from the other Case, and  
to no other but a custom and prescription of Land, that as the Tenant is to be  
made acquainted upon the Land where the Statute is, the Land is to be made  
acquainted upon the Tenant where his feoffment, and arrangements, that he may  
have no after recoverings with his new and old tenant, when the Statute  
shall pass it in force. And upon notice is given, and the Statute shall  
the Abbotry continue.

Now for the heirs in fee, claiming from the Ancestors after his feoffment  
by descent from him, thereby showing a right to remain in the Statute his  
feoffment, the Case is the same before, because during the life of the Feoffee,  
there can be no notion of that right, neither by the Statute, nor by the De.  
telle, nor by the De. because the right is not yet determined, yet let me pass call upon  
the Statute of 22 H. 7. upon the opinion of Mountague Chief Justice, that if  
a tenant in fee simple forfeits his estate, the portion to whom the  
Land shall belong after his death, shall enter and hold it according to his right.  
Now till such entry the discontinuance remains, and the Abbotry shall be up-  
on her. But when the De. enters he is in as heirs in fee, & quasi, by descent  
even in the life of the Tenant in fee of the very same estate, and right in fee  
that was in the mother, by force of the Act of Parliament; And therefore the  
Abbotry shall be upon him.

But now generally, when the Tenant in fee hath made a feoffment,  
and died, his heirs shall bring a Forfeiture in descent, and shall say in his  
Count Descendit in from that Ancestors to him, as heirs, per formam doni.  
And the Answer to the Objection is also important, to say that Descendit in, is  
but as much as Devenit in, for that is to continue property of phrase, and di-  
stinction of cases, which in Writs and counts especially is most apt and  
certain, for, to say Devenit in, is a word common in cases of Descent or Re-  
verter of Remainder, and may be so common phrase in ordinary speech, as in  
this very Statute is said, that the Statute shall remain to the issue after the death  
of his Ancestors, or revert to the De.

And when you speak of Writs, Devenit in will serve no Writ of Count  
of Forfeiture one or other. And any other form improper will abate the Writ.  
It is true that regularly a feoffment barres the Feoffor of all present rights,  
yea and of all after rights and possibilities arising to the same parties by Countes  
before the feoffment, and that, without respect to the loss of strangers, Vide

Albany's case, and Diggs case, Co. lib. 1. And therefore in Archers Case, Co. lib. 1. fo. 66. A. and was devised to the Father for life, the Remainder to his first heirs male. The Tenant for life made a feoffment in Fee and died, the next heirs were heirs of his remainder for ever. For by the feoffment, the estate for terms of life was bound, that the Remainder could not be barred during that estate, and so was settled.

And 9 H. 7. 1. A man devised to A. and in the right of his wife, makes a feoffment in fee, and then the wife is come back to the wife, she is thereby committed, and yet he shall never be Tenant by courtesy. And therefore it is well resolved, that it cannot in England be discontinued, and the discontinuance is a fine with proclamations, so that old discontinuance is not bound to claim, but after his death his heirs must. For the discontinuance both no right; first, for himself, so to be committed claim, and he cannot be bound, so to be committed claim, when it was not in his power to make a claim. And therefore all cases that are put to prove the force of a feoffment, regularly contain nothing against this opinion. What the Tenant in fee by his feoffment, cannot put along his wife's right of intail, because that the Statute of Westminster forbids it, which overrules all private Acts and values of Laws.

But this case is singular, because it is made by Act of Parliament, which is able to make the same. As good to one purpose as given, and held as valuable to another, as the Statute of Bishops, Deans, Priests, and the like, which binds the presentation, and yet holds and valuable against the inheritance, who shall nevertheless when they enter, as to be by way of exception. But that there is still a right in the Tenant in fee against his feoffment's opinion, is that he hath still power to shut it away finally and totally by fine or Recovery if he pursue them rightly, and therefore note Copplidice Case, Co. lib. 1. fo. 4. A. Tenant in fee by his feoffment's heirs make a feoffment and the feoffment binds not the feoffor, Tenant in fee in possession, but the fee in remainder, his heirs (i. e.) the feoffors is not barred but stands to be maintained, or recovered. And Manich's case is there cited and allowed for a law, to these severall intails, by one Recovery with a double voucher.

And this is the law extinguished which speaks of intail, which is could not extinguish any intail, if it were not in himself his power still.

And therefore there is no cause to leave any person's estate and intail, which the Law takes not yet admits, but in cases of necessity, as in vacation of Bishops, Deans and the like, or Remainders in right before upon Freehold. Abeyances are not allowed, but where the Original creation of estate requires them, or where the continuance of estate and cases are in Congruity require them.

As for the First.

In the Case of single Corporations, Bishops, Deans, Priests, and the like, which must die and leave a vacuum of Freehold, or a Remainder to the heirs of I. S. yet living, with provision for the present Freehold.

Or secondly in cases of Congruity. If a man have given warranty and die without heirs, his heirs may be bound in Acro Mater; But if there be an heir in esse, he shall be bound, 38 E. 3. 29. And a voucher may take and plead a Release quasi tenens, Littleton cap. Releases, or may take a fine to the Demandant of the land in Question. But in cases that are of their own nature, in their original perfect and entire, (as this is) the Law permits not to be affected Abeyances, or actions by the voluntary Act of the party, that serve to no good, as this, which should be in part to a right to serve the heirs, and to defraud the King; which is one of the principall reasons which moved the Statute of 27 H. 8. to confound also into Possessions, as being but a kind of Abeyance and shift to keep the profits for the crown que-ue; and to defraud the King and Lords, of their Escheats; and them that have right to demand, of their Actions.

Littleton was confounded in himself that made an Abeyance of a grant of



of Totum statum suum, and yet made it but an estate for life, which is condemned in Walsingham's case by the Judges.

And again although Fictions may take place among common persons, yet the King is not to be answered, bound nor defeated by Fictions: And therefore the King will not be bound in his Reversion or Remainder by recompence gained upon a common Recovery. 6 E. 3. 56. Warrantie Collateral binds not the King, without true and actual Assets; As by Croppells &c. of his owne Recitalles ex certa scientia: Alton Woods Case C. 1. 1. 47.

17 E. 3. The Archbishopricke of Yorke voided, during which voidance, the Deanery also voided, which hath been alwaies Elective, yet the King shall present in right of the Bishopricke as the right was at the best. If you have a right for the good of the time, the King will also find it for his good. The King shall take things at the best for himselfe. The Kings Tenant presents and institutes and before Induction does, the King shall present of new, though the heirs could not in whole right be deemed to do it.

3 E. 6. Dyer 68. Springsfellow, sued an Extent upon a Statute Staple against one Brownesop; The Sheriffe of Bedfordshire extended the land, and mailed the goods, and seized them into the Kings hands; But before Liberate, an Exchequer writ for the debt of a hundred pound of the Kings to be leaved upon Brownesop came to the Sheriffe, who returned upon the writ this speciall matter into the Exchequer, and that he made the same returns into the Chancery, upon the Liberate; and that there were not other goods, yet he was enforced, notwithstanding the Custody of Law, to seise the King.

So the case of Sir Edward Coke, in the Court of Wards, Sir Christopher Hatton made a Conveyance to the use of himselfe for life, the Remainder to Sir William Hatton, alias Newport, in fee, with clause of Reversion, and after became indebted to the Queene; It was resolved that the whole State of his land though not revoked was subject to the Debt by Common Law, without averment of fraud under the Inquisition Quia terras & tenementa habuit.

Then follows the next Question, whether such a right of Forfeiture may be forfeited to the King by the Statute, (for by the Common Law it cannot be.) or what rights of Entry, or of Action in generall may bee forfeited by the Statutes, either in nature of Grant, or in nature of Extinguishment.

It is objected in generall, First, that Rights were neither meant nor mentioned in the Statute of 26 H. 8.

Object.

Next, because the forfeiture of entails estates in possession themselves, was gained upon the people by Circumvention, without naming of them. And therefore they thought it unsafe, to adde or name rights, lest they should have awaked the Parliament, and a law so gotten by art, would not be extended beyond the letter.

The words of the Statute 26 H. 8. cap. 13. are these. Be it &c. that every offender and offenders, being hereafter lawfully convicted, of any Manner of High Treason, by presentment, confession, verdict, or processe of Outlawry, according to the due course and custome of the Common Lawes of this Realme, shall lose and forfeit to the Kings Highnesse, his heires and successors, all such Lands, Tenements, and Hereditaments, which any such offender or offenders shall have, of any estate of Inheritance, in use or possession, by any right, title, or means, within this Realme of England or elsewhere, within any the Kings Dominions at the time of any such treason committed, or any time after; Saving to every person and persons, their heires and successors, other then the offenders in any treason their heires and successors, and such person and persons, as claime to any their uses, all such right, title, interests, &c. which they shall have at the day of committing such Treasons, or at any time before, in as large and ample manner, as if this Act had never been had, or made.

The speciall Act of 31 H. 8. being also in this case, is not restrained to any forme of Attainder, as is 26 H. 8. And it hath the expresse words of, all Lands, Tenements, Rents, Reversions, Remainders, Rights, Possessions, Entries, Conditions,

Conditions, *enjusque nature, qualitatibus aut nominis*, which the persons attainted, or any other to their use, had in fee simple, or fee taylor, and hath such a saving as the other, and a provision that his attainder shall not prejudice such to whole use he was seized.

The Statute of 33 H. 8. cap. 26. saith thus. That the Kings Majesty, his heires and successors shall have as much benefit and advantage by such attainder, as well of uses, Rights, Entries, Conditions, as Possessions, Reversions, Remainders, and all other things, as if it had been done by authority of Parliament, and shall be judged and deemed in actual and real possessions of the Lands, Tenements, Hereditaments, uses, goods, chattells, and all other things of the offender so attainted, which his Highnesse ought lawfully to have, and which they so being attainted, ought or might lawfully lose and forfeit, if the attainder had been done by Authority of Parliament, without any office or Inquisition to be found of the same, any Law &c.

This Statute 33 H. 8. hath no better words for the rights and things forfeited than 31 H. 8. and hath no name of entayles, only it giveth to the King the present possession.

Solm.

And now out of the Consideration of these Statutes I answer; That the pretence objected is neither honorable nor true; for the Statute 16 H. 8. it self speaketh plain that the party attainted of Treason shall forfeit all his Lands &c. of any estate of inheritance, and there were but two estates of inheritance, (viz.) Fee Simple, which was forfeitable by the Common Law; And therefore the Statute could worke upon nothing but entayles, and this was full and direct, and not by generall and ambiguous words, as Trudgins case, cited by Coke in Follers case, which was but in these words, that a person attainted in a Premur shall forfeit all his Lands and tenements, goods and chattells, to the King, but saith not of what Estate. Again that Statute of 16 H. 8. gave Churchmen power to forfeit Land of their Churches, by the words killed or inheritance by any right, title or manner whatsoever, which had less power in justice both of Law and Equity, to make Detractions of the inheritance of their Churches, than the Common Law of fee simple. And to shew plainly that the Statute proceeded, unimpaired, it did expressly create new Treasons of inferiour nature, holding of Feys, Whipping, and Banishment. A thing whereof the people were ever so extremely jealous, that they looked upon the Laws of 25 E. 3. to all Judges to doe any thing that way; reserving that as a peculiar to themselves in Parliament, in these words, thus. Because many like cases of Treasons may happen, which a man cannot thinke of, It is recorded that if any such happen, the Judges shall carry without Judgement, till the Case be declared in Parliament. *Tunc est Custodia qua sibi met creditur.*

And touching the word Rights, though 26 H. 8. hath not the word Rights in the purview, yet it hath the word Rights expressly, in the excluding of the offender; and his heires, out of the saving, which was enough to stricken them. But besides that the speciall Act of 31. hath all the words, Rights, Possessions, Entries, and Conditions expressly in the purview, as hath been observed.

But on the other side, if a man would examine, judge whether the Stat. of entayles it self did not gain upon the King exemption from forfeitures for Treason, by generall and cunning words. For there is no word of Treason, nor word of any kind, but only *Non habeant potestatem alienandi*; as if they had sought only to save estates taylor, from grants and Sales.

For Edward the first was too prudent and magnanimous a Prince, to have given assent to a plain Statute that the estates which then were subject to forfeiture of Treason, should be exempted by a new name of May, being in effect the same estate that was before.

But now it is contrabested what Rights are made forfeitable by this Stat. of 16 H. 8. or by the speciall Act of 31 H. 8. or by the generall Statutes 1693 H. 8.

And this is a point of great Consideration not so much for this particular case, as for the generall of all forfeitures of rights, in all cases of Treason whatsoever, and upon all Statutes.

And

And first it is granted on the other side that right of Entry is contested, but right of action not. And so they urge the warrant of the Sparquess of Winchester case C. 1. 3. and Doughties and Englefelds case; And then again they restrain the Right of Entry, to the Entry by a Distess upon the Distess, by the rule or limitation of attainder at the Common Law, that gave no other. In which case the King could not have an Action: for the priority that is in Action.

But now I hold, that where new remedies are given by Entry, which was not before by action, the King shall have them by the two Entries, upon the Statutes of 31 and 33 H. 8. And therefore I put the two cases upon the Statute of 32 H. 8. cap. 28. of Entry given to the wife upon the testament of the husband, & the other upon 32 H. 8. cap. 33. the Entry of the Distess upon the heirs of the Distess, dying within five yeares after the Distess: The King shall have those Entries in both, but not by the Statute of 26 H. 8. 6; 31 H. 8. But by the Statute of 33 H. 8. which gives Entries by special words. Which 33 H. 8. was made after those new remedies by Entries given. But the old Action of *Cui in vita*, or Entry *sur Discein* is not given. And the Entry of an heir upon a Forfeitures Discontinuance upon 11 H. 7. is also given by 32 H. 8. For I will never shorten the Kings rights where Justice beares it, that is, where the King hath the words full, and it may doe the King good, and no hurt to any other but to the person attainted, and his heirs, which the Statutes do all barre. Therefore bind not the new Statutes to the Common Law, that their words, enacted for the Kings advantage, should be deprived of their force, as in Commissions, Rights, Entries, both upon 31 and 33 H. 8.

And touching the other part of real actions I was distinguished, that if the Heir of his fathers claiming as heir, be at the time of his attainder intitled to a real Action to the Lands of a stranger; that the King shall not have this right by forfeiture of Treason; and so farre goes the case of the Sparquess of Winchester and no further.

And therefore they put these two cases in generall. If tenant in tale make a feoffment in fee, and then be attainted of Treason, his right of Forfeiture in Descender against the Discontinue, is not given to the King, to recover against him. So if Distess be seised, and his heirs in by descent, the Distess is attainted, the King shall not have it; yet in Wallinghams case that very point was in effect adjudged contrary; for though in that case Wyat was tenant in tale, with Reversion in the Crown, that made the feoffment, yet the Court in their judgement took little hold of that reason, but made it the generall case of a Common tenant in tale, that makes a feoffment, and then is attainted of Treason, that he hath still a right remaining in him, which his heirs may claim from him, by a Descendit Jus, and therefore hath power to forfeit it. And it is to be noted that in the whole argument of that case, (though it were argued by great learned men on both sides) there was no man made touch neither at Barre nor at Bench, that such a right could not be forfeited, as now it is resolved, which hath made an end of the Question, for it was in vain to dispute whether he had a right or no (which was made all the Question) if he could not forfeit such a right whether he had it or not.

And it is as worthy the noting that the Sparquess his case, which was within ten yeares after. For Wallinghams case was 15 Eliz. in the Exchequer, and the Sparquess his case in the 25 Eliz. in the Kings Bench; They called mutually upon a speciall reason of that case, which was a writ of Error to reverse a Common Recovery, where the Person attainted was intitled as was pretended; and which the Queens would claim by his Attainder, which they adjudged clearly she could not have; Because it was an action of priority, which could not be passed without generall words. And that they caused to be entered upon the Roll, as the ground of their judgement, omitting their other reasons, used in the discourse of their Arguments, which was plainly done: For they took a sure ground for their owne judgement, and yet did not expressly cross the former judgement, because the cases differed; upon which reasons also,



also, though Conditions be given by the Statute of 33 H. 8. yet Conditions of possibility and that are inseparably inherent in the person, are not given to the King, as it was resolved in the D. of Norfolkes case cited in Englefields case.

I speak not this as though I differed in my opinion from the Rule of the Sparquelles case specially taken, as there it is, of a right of action in the person attainted, to the Lands of a stranger, for the reasons there spoken of, and some others as strong as those, (viz.) these. That since a forfeiture is a kind of grant, and that more rights cannot be granted, it cannot be thought that the Statute meant to give power to forfeit that, which the party had not power to grant; that is to grant to one, a right that he hath to the land of another; which reason is urged with that Distinction, Lampets case C. 1. 10. 48. And again the scope of the Statute appears plainly to prejudice no stranger but to save their estates, and rights, fully, as if the Statute had not been made; which could not be if the King should be put in the place of a subject, to pursue old and sleeping titles with a greater strength than the subject could, and tendeth to maintenance of the Rights and Titles of Strangers to the prejudice of ancient and lawfull possessors; an abuse against Common Law, and against the current of all Statutes in all ages.

But now if any man suppose that the case of the Sparques, or the Law both warrant a generall Conclusion, that no right of action of the person attainted is given to the King, I say he is in a plaine and dangerous Error, in the construction of these Statutes, to the wrong of the King and the Commonwealth, for they make but one, and to the preposterous favour of great spoilers and waste of the State.

Nothing is more naturall then to marry, and reduce Rights to their possessions, therefore nothing longer then to sever them, and therefore as I doe allow that opinion in the Sparquelles case, and the reasons for it as before; So I am utterly of another mind in those cases, whereby the forfeiture, Rights of Action in the persons attainted may come to the possession of the King to confirme it; or where it goeth with the possession that is forfeited to the King, to establish it, and can be otherwise of no use, being kept from the King, but to defeat and defraud the King for the benefit of the person attainted, expressly against the letter and the whole scope of the Statute, that thrust him out of the Daring, and all hope. So the words shall worke like to Littleton, Title Confirmation 531. The Disseisor gives land by Deed without Liberty to the Disseisor being tenant, this confirms the land and state, and yet the word, is land not right, give land, not confirme it.

And therefore I put this case for example which no man can deny; that Tenant in tale discontinues, and the discontinuance conveyes the land to the King, and then the tenant in tale or his issue is attainted of Treason, the King shall have this right to worke by way of confirming his estate.

But I agree that if the discontinuance in that case, did convey the Land unto the King, but for terme of his life with the remainder over to a stranger; and the tenant in tale or his issue were attainted, that though the King should enjoy his estate confirmed; yet the Remainder should lye open to the right of entayle.

But turne the case, that the Discontinuance did convey the land to J. S. for life, the Remainder to the King in fee; and then the attainder had followed, the Kings state is confirmed and by consequence the estate of the subject for life that supposes it cannot be impeached: For the forfeiture is given to the King, and to no other but for the Kings good: And that answereth my brother Harrons objection, that the right of the old intayle might be larger then the present intayle that was to be forfeited, and therefore should not be intended to be forfeited together with the estate in possession, for the King shall have use of so much as concerns him, but it shall not be used, for the benefit of any other besides the King. For no forfeiture is given to or for any other, neither ought any right of action to be given to the King, that may be used against a stranger, but against

against the offender himself it is clear contrary, both because his rights are given to the King and because his heirs are excluded out of the saving from their rights.

Hitherto we have spoken of naked rights of Nations, which the person attainted may have to the land of a stranger, as to the land of the King himself. Now we will speak distinctly of Rights such that the person attainted hath in his own land, whereof he is seized and to which he is to succeed by his Attainder, which right is other and more ancient and better, than that whereby he hath and holdeth the lands and possession, whereof he is seized at the time of the Attainder, which is the very cause now in question, whether the heirs of the person attainted shall have any advantage of such a right to succeed the estate and possession that the King takes, by force of the attainder and of these Statutes or either of them, whereof the Statute of 26 H. 8. the particular Statute of 31 H. 8. speaks so clearly and definitely that to dispute it is to make a point for which none is; and the case of the Lord Lumley which was cited out of Gold. l. 3. 10. is nothing to this purpose. Ayel, Pere, Fitz, le pere en vic del Ayele is attainted de treason, the Father dies, then dies the Grandfather, the Son shall inherit from him. This is clear by the Statute of 26 H. 8. chap. 17. which gives a forfeiture of the lands of the person attainted, which cannot prejudice the land in that case, because his Father which was attainted had nothing in the land at the time of his attainder, but the Grandfather who was not attainted, and from whom he may succeed the lands by the help of the Statute of Westminster the second, of examples, whereof here it is plain that the person attainted had the land in question in fee, which is to be understood with the words and meaning.

And I hold plainly in this case that as the land is given to the King, and literally given to the King, so the right is absolutely and fully given by way of discharging the land, as to the Kings estate or that which is his, whereof it was meant to be freed: And so the land given unto the King is discharged by it. For now when the Law saith that the King shall have the land having the right of all persons, other than the offenders and their heirs, and they are alive to their life. It is plain that the eye of the Law-maker, was not only up on the lands in possession, but also upon the right to the same. The Law viz. the Land in possession, in point of giving, the other in point of having, or barring.

The Land in possession given, could be but in one, that is, in the Offender, and so it was given. But rights to the same Land might be in many persons, in the Offender, or in his heirs, or in strangers.

Now then the Law saith, the King shall have the land although, having the rights of strangers, but without having the right of the Offender or his heirs, or any claiming to their use; which is as much as to say, that the King shall have the Land, without having or excluding or freeing or discharging of the rights of the offender, or his heirs, or against the offender and his heirs in fee, or of fee tails, so it it had been saving to all strangers and their rights etc. and the (other then) which besides the forfeiture had been utterly excluded, the strangers had been provided for, and the widows excluded, if the lands had been all in the parishes that are divided in the parishes and saving, it had been said, as to say, that the offender shall forfeit the Land, against him and his heirs, excluding the saving to strangers. And *Ancipis verborum sunt iudice indigni*, and therefore where it was said, that the word of discharging the right of the heirs in tails, was a new invention, and that there was no word of barring or discharging the rights of the offender and his heirs in the Statute, as there is in the Statute of 31 H. 8. it is plainly mistaken, for it is the same (joining the parishes and saving with the exclusion of rights of heirs together) with the word of discharging as hath been said, except we think that the same thing cannot be spoken but in the selfe same words.

Note that the Stat. of 31 H. 8. gives rights in the parishes annuity, as well

as Land, and again diſcharges it, by excluding it out of the ſaving.

For example, Tenant in Tail diſcontinues and diſſeſſes his Diſcontinuer, and is attainted of Treason, he ſuſtains his Land gained by diſſeſſin, and his right of entail he cannot uſe againſt the King by force of theſe Statutes. And this ſtands with the rule and reaſon of the *Queens Caſe*: For, *Contrarium contraria eſt ratio*. The Treſpaſſers right to the land of a Stranger ſhall not be given to the King, for the quiet of the Stranger being poſſeſſor; Therefore it ſhall be given to the King being poſſeſſor, for the quiet of his poſſeſſion. And the word of Hereditament in the Statute of 26 Hen. 8. and the word of Right it ſelf, in the Statute of 31. & 33 of Hen. 8. are both ſufficient and fit to cover ſuch rights in ſuch Caſes. And we need not diſpute but that the words are full and ſufficient to cover ſuch other rights to the Lands of Strangers. And therefore it is not for want of words that they yield not, but becauſe it was adjudged that it was not meant. And ſo it was ſaid in *Doughties caſe*; ſo you have an Equity for the good of the Subject againſt the King, eſpecially againſt later.

Therefore ſhould it not ſeem that nothing be loſt for the King where both letter and meaning are ſufficient for him. And you may ſay, ſometimes that the Parliament that gave the Land to the King, ſhould leave a right to the Treſpaſſer to the ſame Land to ſubſtitute him of it again, ſince the Statute gives the Land out with the right, and the ſaving ſaves his right again.

And this point concerning the ſubſtitution and extinguishment of all manner of Rights of persons attainted of Treason, ſhall be ſaved for the benefit of the Kings ſubjects in all ſuch great importance, that if it be not taken at large as I take it, it is an abridging of all the Statutes, even that of 33 H. 8. cap. 20. For, though that ſaves the Treſpaſſers right, ſo ſhall 31 H. 8.

And it is againſt both laws, that the Treſpaſſer (right) in both Statutes both not include the right of Treſpaſſers to the Land of Strangers, by an equity againſt the King. And if you ſhould ſay alſo that it ſhall not extend to old and ſole Rights, that the Treſpaſſers ſhall have but in the Kings Lands, becauſe the King hath the Land, and the rights which the Treſpaſſers ſhall have but in his own Land which he may ſave upon theſe Statutes, you open a wide door to every perſon that perſuade Treſpaſſers to make poſſeſſion before hand, that though you get ſome ſtuff in his Land, yet he will have ſome ſecret right ſo ſuch it ſtays from you again. So that where the Statute of Treſpaſſers may be truly ſaid to be a real and perpetual Right for Treſpaſſers and Treſpaſſers it ſelf, which ſtatute could not be but for the ſervice of Treſpaſſers only. So that Statute that the Treſpaſſers ſhall be ſaved to ſubſtitute of Treſpaſſers may be ſaid to kill Treſpaſſers it ſelf, occidere ipſam poſſeſſionem. And the *Exigent* was ſaid to kill preſbyterianiſm when he took away their liberty. And conſequently this interpretation ſhall be otherwiſe ſaid to be a way of confuſion, for who ſhall not hold many ſeparate perſons (as all Treſpaſſers are) who ſhall not be hazard themſelves for the compoſing of their wicked ways, ſo they may prefer to their poſſeſſity, and their ſtates, to prefer to their liberty that ought for ever to be inſeſſed; and therefore this queſtion is proper & ſeems to be a reaſonable deſign.

In good faith nimum alterando veritas amittitur; And I ſaid that when a man commits a ſinuation it had to be ſaid, that the clearance of the ſin needed not; For what is all this but where the Statute ſaith, That the perſon attainted ſhall loſt his Land and entail to the King and his heirs, &c. from and againſt the Offender or his heirs, It is ſaid he ſhall not do ſo, neither ſhall the King have it but the offender and his heirs ſhall retain it; And ſo the right eſpecially given and eſpecially contradiſtinct as to treſpaſſers, and eſt nolumus.

And now to give anſwer by the way, to a point ſtirred, with much aſſurance, on the other party which was this: Kacharine, the wife of Bigod during her time was ſeſſed of an eſtate ſubjed to the Forfeiture of the next heirs upon the ancient entail, whereupon he might have recovered, and then he muſt have been ſeſſed of the old entail, which was paramount the Kings title, and ſo ſhould



should in effect have eited the Kings estate as well as hers, and then it's said, that the cause is all one of Remitter and Recovery.

To this I answer, that if I may make my case, I will make the Law so; my case, and so this case is made at pleasure, as the party would have it; For, there is no such case, but if there were such an one it is true that the woman would have much ado to defend her selfe; For, she could not claim any defence by the Kings title under whom she claimes not, and also till the office were found the right was in the heirs who must implead his mother, and after her death both possession and right were according to the case of the sparques in the heirs, and so was found, and also the Remitter, de facto was in forces. But now and ever since the Office the case cometh right between the KING and the issue which is just that either party may plead and defend his cause himselfe.

This Objection also doth receive divers considerations and Answers; For first, since the ancient title of the issue is extinct by the Statute together with the Husbands estate taylor, which is barred by the attainder against him, and his issue, and the wifes estate as a stranger by survivor, not claiming under her Husband, nor under that estate is saved, in point of contingencie, if the survivor, and not else, whereof this issue can take no advantage, so; he is no stranger within the saving.

All this appeared to the Court, the whole case being found, or pleaded, specially by the woman that though the woman, be sufficient tenant to the principle, yet the issue is no sufficient demandant, so; he must demand the old intayle, which he cannot have, because it was extinct by the Statute, and a new, or lesser estate he cannot claime, so; that is not his true estate, as in Dalimores case of Feoffees to uses, 13 & 16 Eliz. Dyer 329. So the wifes new estate is false because the old estate and title is gone, and the King cannot claim by that old right against her, because it is not given him by the Statute, to the prejudice of her being a stranger (as hath been said,) but by way of extinguishment in his possession, so; the establishing so much of the new estate as he takes by the forfeiture and the Statute. And also because the Kings title, and the wifes are from one roots, the wifes estate shall not be impeached; lest the KING thereby should be hurt. Against, if it be said, That though the right should be said to be extinct by the Statute, yet that should be only as to the King, because the Land is only given to him discharged of the title, and so there were no defence to; the woman in the Forfeiture.

I answer, That as to this Imagination of a Forfeiture, between the issue and the wife, and a recovery upon that, and so to see how that should joyn upon the Kings title to prevent it upon the death of the woman, who could not defend her selfe by the Kings title, though it be good.

I answer, and say first, that there is no such point in the case, but the wifes estate continues still after her death, and it is a part of that latter estate and taylor, which is forfeited. And whereby the King claimes, and so it supports the Kings estate.

Touching the point of Remitter, it must have two things, that is, an estate in possession, descended from KATHARINE to her issue of her estate taylor, and to that must be joyned a right of the ancient entayle.

Now touching the forfeiture of Lands in taylor before the Statute of 33 H. 8. scilicet, upon the Statute of 26 H. 8. and 31 H. 8. I am of opinion in generall, that the Land of Tenant in taylor ought to come to the King in an attainder of Treason, upon the death of the person attainted without Office, so as the heirs in taylor shall not inherit, notwithstanding the opinion of Doughties case, that the Land in taylor shall descend notwithstanding the attainder till the Statute of 33 H. 8. because the blood is not corrupted by the attainder. So I hold that opinion that is called a Resolution, to be but a matter of discourse, and no point of judgment nor pertinent to the judgment of that case, and to be erroneous. For it is plaine, that tenant in taylor with reversion in the Crown if he be attainted, his blood is corrupted, and his estate taylor consisteth upon his death,

and the Land reverteth to the King in possession. And that is the judgement of Aultens case 1 & 2 Ph. & M. Plowden, Walsingham 560. which went so far, as to avoid a Lease made by Tenant in tail, though he left issue, which I must confesse was an hard straine, and so was Sir Nicholas Carews case cited, 16 Eliz. Dyer 332. where Wray, Dyer, and Sanders gave opinion upon an award, that the entail in such case, is extinct and the heire disabled; For, he is an issue but no heire.

Wherefore this position is not true generally. That attainder of Treason, doth not corrupt in entails, but that they shall descend till office found.

But now it is true, That where tenant in tail the reversion to a Subject is attained of Treason, there is no corruption of blood, for then there must be a Celler of the estate tail, which would be expressly contrary to the Statute which gives the estate to the King, whereas by the Celler it should accrue to him in the reversion.

So there is a corruption, or no corruption, for severall reasons, in severall cases, upon the selfe same words of forfeiture; For, there is no word in the Statute of 26 H. 8. of corruption of blood in either case. If you aske me then, by what rule the Judges guided themselves in this diverse exposition of the selfe same word and sentence.

I answer, it was by that liberty and authority that Judges have over Law, especially over Statute Lawes according to reason and best convenience to mould them to the truest and best use, and so to give the King his entail which himselfe is in reversion, to his best advantage, by way of extinguishing and Celler, and where he is not in reversion to give him the Tail by one Questrate, and both by the same word of forfeiture, whereof I make this consequent. That as those Judges doe expound the Law to the best, for the King in that case without any helpe of words: So we may with more reason judge that this Law of 26 H. 8. and 31 H. 8. that makes entails forfeitable for Treasons as Fee Simple, that in both cases upon the death of the offender the heire should be disinherited and the King shall have the Land immediately, though in both cases of Fee Simple and tail the offender himselfe should receive it during his life, because Free-holds are not removed without some Ceremony of Law, as Office, Entry, execution upon judgement, or the like.

And observe that about this time the estates tail were by the Statute of 33 H. 8. made plainly liable to the Fines of Tenants in tail as Fee Simple, and so by the Statute of 26 H. 8. the Tenant in tail is made also to forfeit the whole estate, by Treason as Tenant in Fee. And for more cleerenesse of meaning, they only take the rights of strangers and exclude the heires, as privileges, even as the Statute, of Fines doe; In as by the true meaning of 26 H. 8. neither land nor right in this case should accrue to the heire but both to the King: And by consequence there should be no Remitter to the heire, in whom new possession and old right must meet to make a Remitter.

And I reason thus upon the Statute of 26 H. 8. that gives the Forfeiture of entails; What is the Statute of Westminster. after the purbais, that tenant of Fee Simple conditional should have no power to Alien, should have subjected a profit; What if they did commit Treason, they should have forfeited as they should have done before the Statute. Notwithstanding I hold then, that as to the forfeiture of Treason, it should have remained subject to all purposes as before this Statute, as well to forfeiture of estate as to corruption of blood.

Now as that clause had not suffered the case to come within the Statute of Westminster. to this Statute of 26 H. 8. takes it out of the Law againe, by the contrary meaning of that whereby it was brought in, that is, that whereas the Law did disable him under the word of restraint of alienation to barre his issue, and yet doth not give him power to corrupt the blood, not for any care of him, or of his blood, but because that had brought expressly against the end of the Law as is said before.

Also the reason used in Doughries case is of no value; for it is not the corrup-

tion of blood, that both bying the Land to the King; for then restitution of blood would restore the Land to the person attainted and his heirs, which it doth not though it be by Parliament, as appears by all the Acts of restitution in blood onely, and in the very case by the restitution of blood to Ralph Bigod by Parliament.

Also the Land is forfeited by attainder ipso facto, so that the Lord may enter by force of the forfeitures which gives the title against him for the whole estate, so that the heirs is involved in him, and the descent intercepted and prevented by the State given away by the forfeitures, not by the corruption of blood.

But now to the point, which I make the third in this case. Admit that an office were so requisite in this case, that both Land and right should descend to the heirs for want of it, as is the opinion in Doughties case, and so works a Remitter in him for the time, yet I am of opinion clearly, that this Remitter was but temporary, till office found, and that when office was found, both Estate, possession, and right vested in the Crown by force of the Statute of 26 H. 8. and of the attainder according to the State and right, that the person attainted had in it at the time of his attainder. And this is just both for the King, and Subject that since the Kings title was just and true, and ought by his Officers to have been promoted and found in due time, which if it had been it had been clear for him against the heirs as is confessed. It is no reason that the negligence of his Officers, and perhaps their compact and combination with the adverse party should defeat the King. *Vigilantibus & non dormientibus jura subveniunt*, is a rule for the Subject, But *nullo tempore occurrit Regi*, is the Kings plea, except it be in some trifles, as usurpation, and death upon his lapse or the like. And put the case that the Statute of 26 H. 8. had said, that if a tenant in tale of Lands be attainted of Treason, then upon offence found the King shall have the Land. Would any man have doubted but that though the Attainder had not given the Land presently, but that it must have descended to the heirs till Office; yet upon Office found the King should have taken the Land from him: and this case in question, is in effect the same and in the very point the case, 3 E. 4. 25. of the Earle of Northumberland cited in Nicholls case 489. is thus, A man disseises the Kings tenant, and the disseisor is attainted of Felony, and before Office the disseisor entreats upon the Land (as he may) now clearly the disseisor is remitted. When the office is found for the King. It is agreed in the booke, and now on both sides, that the Remitter is defeated, and that the possession and land is given to the King, as it was in the person attainted, and the right remains to the disseisor to be pursued and recovered against the King, and so every man hath his due and no wrong done either to the King, or to the Subject; For, the Kings title was to the Land, by the Attainder, not by the office, which did but find the title, not give it, and that was his due, and the disseisors due was the Right that remained to him notwithstanding the disseisin, and the attainder, and the Office. And it is against reason, that since the Office was devised by Law for an Authentick way to bring the King to Land by solemn matter of Record suitable to his Regalltie, and for the safety of the Subject, that he should not enter or seize the Lands of the Subject upon summons without matter of Record, that this should be so bound to times, that if he keep not his summons, he should lose his land for ever. And the case of 3 E. 4. is much stronger then this case in question, for there the disseisor might forfeit the Land (for it was his) but the right was not his but the disseisors, whereas in the principall case, Francis Bigod hath both possession and right as hath bin proved, and so forfeited both to the King.

And this case was heretofore brought to consultation of all the Judges, 34. Eliz. Sir Edward Coke made the entry in writing, which is extant, but without the parties names; the Copies whereof have been sent by us all; wherein the case being put (as hath been said) without names, the Question was made, whether Queen Elizabeth, or the heirs should have the Land. And these great objections were made against the Queen, that now are.



First, that here the old right could not be forfeitable to the Crown by the Statute of 26 H. 8. as was resolved in the Marques case.

Secondly, that the person Attainted had not that right by reason of his Treason, and therefore could not forfeit it.

Thirdly, that the heirs was remitted by the descent of the Land and the ancient right meeting together in him, and the Book of Plowden Nichols case 489. cited; that if the Discontinuance convey to the King, and he grant it to the Discontinuer for life, the remainder to the issue in tail, that when it cometh to him he shall be remitted; And the Kings estate voided. But the Judges unanimo voce resolved that because here was an actual estate in tail in the person attainted at the time of his Attainder, that that estate was plainly forfeited by the Statute of 26 H. 8.

And that the rights of him and his heirs had been bound by that Law if there had been no saving, and there was no saving for them because they were excluded expressly, and therefore they are bound by the body of the Act. So there is a diversity between a naked right of Action alone, and when an estate of Inheritance is coupled with such a right, which by the forfeiture of the estate in possession is barred by the said Act and exclusion of the saving.

And lastly, when this appears by Office, then the issue in tail is barred, notwithstanding the Remainder, and therefore it differs from the case out of Plowden of Remainder; For there the ancient right in tail was not barred.

Upon this case the Bishop of Lincoln, Lord Keeper, and the Lord Lea Lord Treasurer, having heard all the Arguments, gave judgment for the King, and the Lord Sheffield; that the former judgment given in the Exchequer should be reversed.

### The Earle of Ormonds Case.

This was about  
15 Jac.

The Earle of Ormond deceased, late Father unto the Lord Dingwall; He being Count in Earle of diverse Honours and Lands in Ireland &c. did make a Common Recovery which was to the use of his Last will, and afterwards by writing under his hand and Seal, did declare, that his intent and meaning therein was, That the said Recoveries and their heirs should have, sold of the said Honours and Lands, to the use of himself and the heirs males of his Body, the Remainder to the use of the Lady Elizabeth his daughter (now the Lady Dingwall) and to the heirs of her Body, the Remainder to the Right heirs of the said Earle. And after all this the said Earle and his said Recoveries did make a feoffment unto three Persons &c. and their heirs, and limited unto uses, Two of which Feoffees had notice of the said former uses, and the third had not notice thereof; Quid Juris?

1 Question.

The Case consisteth upon two principall Questions.

The first Question; Whether the uses thrust by the said writing under his hand and Seal, and whereby the uses in Remainder in Earle be limited to the said Lady, be revocable or no.

For if they be revocable at the will of the said Earle, then he hath silence made a Revocation de Facto, by limiting other uses, and so the state of the said Lady determined; But if they be not revocable, then an estate in use in Earle being fixed in the said Lady, the case by way of admittance and supposition will be further thus.

Cestuy que use in Earle to him and to the heirs males of his body, the Remainder in Earle to his daughter, the Remainder in fee to the use of the right heirs of the first Cestuy que use; The said first Cestuy que use and the Recoveries have made a feoffment in fee unto three persons and their heirs and limit unto uses, Two of these Feoffees having notice and the third having no notice of the first uses, and the first Cestuy que use afterward dies; Wherupon, The second Question is.

2 Question.

What Remedy the said Cestuy que use in Remainder in Earle (which is the Lady Dingwall) hath to recover her said use and to restore her to the same.

Whis

This case was referred by the King to the Two chiefe Justices Mountague, my Delfe, and Justice Doddridge, and this Report of it, made by us all to the King.

As concerning the first Question it is thought by one of the Judges (sc. Mountague) that the Remainder in Tale in use limited by the said writing to the Lady Dingwall cannot be revoked or changed by the said Earle and the Recoversors. *The Reasons.*

First, that although the first uses upon the Recovery were to the use of the last will of the said Earle, and so to the use of the said Earle and his heires untill he should expresse his will and Intention, concerning the same, yet when he had expresse his intent and meaning once by a writing sealed, and subscribed by him, and so once notified and published the same, and thereby given an Interest unto a third person by an expresse, he cannot more recall the same, as he might have done if the same limitation had been by a last will which is still subject to change.

The limitation of uses by this writing whereby the Lady claimeth, doth not rely upon the former uses of the Recovery, nor doth relate therunto, but seemeth rather to be deduced out of the free disposition of the said Earle by way of Donation and Gift sealed, and not by way of his Disposition changeable.

It is conceived by the other two Judges that the said uses limited or the said writing were revocable at the will and pleasure of the said Earle at all times and from time to time. *The Reasons.*

First, when such a Conveyance is made to the use of the last will of him that maketh the said Conveyance, the Feoffees or Recoversors in use, in such a case, stand seised in the meane time, to the use of him that maketh the Conveyance and his heires, untill limitation be made of his will and meaning concerning the same.

But nevertheless whensoever he shall make any such particular limitation or disposition of the said uses, whether it be by a last will, or otherwise by Deed or writing, as long as he appointeth that the Recoversors which were charged with the first uses, shall stand seised to other uses, and buildeth his new limitation of uses upon that former foundation, (being in this case the Recovery) and as an explanation of his Intention expresseth uses, as in this case he did by the said writing, the said uses are alwayes revocable, because they are grounded upon the first assurance, namely the Recovery which was to the use of his will, which is alwayes subject to change.

Secondly, The Recoversors in this Case were seised to the use of his last will, which is not to be understood a Testament only, but to be extended unto any other voluntary Disposition or Grant whatsoever, and the uses limited to the said Lady doe not contradict the first limitation, (viz.) to the use of his will, or are the same, but rather stand as an Exposition how his meaning in particular should be for the time, and yet nevertheless still subject to the change and alteration of his will, and that is agreeable to former Resolutions in bookes in like Cases, and also agreeth with all the subsequent Acts of the said Earle.

As concerning the second Question the said two Judges doe agree in this.

That upon the new uses declared upon the last feoffment by the Recoversors and the Earle being Cestuy que use the new Feoffees cannot be seised but to the new uses; But yet the two Feoffees that had notice of the first use are bound to make recompence for the wrongfull change of the old use, and because that turnes to the benefit of the said Earle his estate may well be made answerable for it. But for the other third part which is in the third Feoffee, that had no notice, there is no remedy at all.

The Reason upon this latter question is this.

Because, the said Earle was Cestuy que use in Tale to him and to the heires males of his body, and had the use of the Remainder in fee simple, he and his said Recoversors, had full power, to alter and change his said use in possession, during the life of the said Earle, and the fee simple absolutely without prejudice

prejudice of any, and seeing that the said Cessay que use and his Recoverors which are the owners of the said Land in Law, have disposed of the same by a feoffment, and have declared unto who upon the same feoffment, there is no remedy to revive the use of the said Lady by course of Law, which must be by recovery of the Recoverors, which they cannot make in this Case contrary to their own feoffment; But yet for that a wrong is done thereby to the said Lady, they are bound to make to her in Equity and Conscience a full recompence for the same, which may well be done and had (as this case now standeth) out of the said Charles estate, because it turneth to his advantage as hath been shew'd.

And, The King in his shew (for the Cases of Ormond and Desmond were touch'd in our last Court) shew'd a piece to stand in the Kings favour) recited this difference of opinion, and that upon it he desired the opinion of some other Justices (of which Norton was one) who agreed with Mountague. But the Cases of Ormond touch not it, neither have his learned Counsel been to speak before them, as they did before the first Court. And the King in his shew among other things, gave to the Lady Elizabeth Ormond (the same being controverted upon this point) for her part.

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**FINIS.**

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## The Errata.

Page 2 Line 39 & 40; betweene be found and for adde but *Quere* p. 314; for which was to read which were to l. 48 blot out *Vifum* from town or parife in the Record in the margin p. 61. & for *Safely* r. *falfely* p. 31 l. 52; blot out *Hobart* in the margin p. 14 l. 37. after *daughter* 19 wife r. *did affume and promife* that l. 31; after *all* adde for l. 31. after was blot out *To be done* after *Either* blot out for p. 16 l. 28; for *Court* r. *Count* p. 18 l. 10; blot out *Salaw* p. 19 l. 6; blot out *Quere de c.* l. 16 for *Octoginta* r. *Octoginta* l. 30; likewise r. *Octoginta* p. 10 l. 20 blot out *Nouwife* in the margin p. 21 l. 10; for *Plaintife demurred* r. *Plaintife's demurre* l. 44; blot out for l. 47 for *Imported* r. *Imputed* l. 48; blot out *Sinca* l. ult. blot out 11 H 4; p. 23 l. 1; for *Counterpleat* r. *Counterplead* l. 4; for *Voucher* r. *Warantur* l. 34; for *and r.* as l. 44 for *W. 1. ca.* 19; r. *W. 1. ca.* 40 p. 23 l. Antepenult. r. *it appears* p. 27 l. 29; for *Tailed Remainder* r. *Tails* the *Remainder* p. 37 l. penult. for *To them* r. *By them* l. 11, 27, 39; for *Barram* r. *Borgham* p. 29 l. 11; after *Therof* adde *shall goe* after *Heires* adde *Males* l. 54; after *Jane* adde *And* p. 31 l. 47; for *derisid* r. *divided* l. 51 blot out *Whether it be by way of purchafe or by way of defcent* p. 33 l. 2; for *derisid* r. *derisid* l. 13 for *Some of* l. D. *Some of the daughter of* l. D. l. 21; for *after the testator* r. *after the death of the testator* p. 34 l. 25; for *7 Jac.* r. *27 Jac.* p. 41 l. 13; for *Theobald* r. *Thouffan de Holland* p. 49 l. Antepenult. for *proved* r. *provided* p. 51; in *titulo* pagine for *See vers.* 9 *Mansfield* r. *Mansfield* case l. 16 likewise r. *Mansfield* case p. 92 l. 15 in margin after *The Bench* r. *By Hobart Nichols and Warburton*; then for *and winch* r. *but winch* p. 50 l. 37 l. 7; for *Wharffton* r. *Enterpen* p. 54; Between *Plaintife & Thar* adde *Replies* l. 38; & 39 for *By us* and *Quere* r. *By an Audita Querela* p. 59 l. 24 blot out *Tames* *Quere* p. 61. 2 for *Then demurred* r. *The plaintife demurred* p. 73 l. 49; for *Barn Tanfield* r. *Justice Montague* p. 77 l. ult for *Chester* r. *Lancaster* p. 78 l. 8. for 21 H 6; r. 23 H. 6. c. 15; p. 80 l. 13; where the full point is make a ( ) and blot out as after *Reid* make a ( ) l. 35 for 6 r. 8. 83 b. p. 90 l. 18; for *Dominic* r. *Dominus* p. 9 l. 7; blot out and p. 103 l. 16 after *for* adde *bers* l. 27; for *before* r. *where* l. 51; for *have* r. *leave* p. 104 l. 25; for *with* r. *within* l. 30; for *Confirms* r. *Confesses* l. 43; for *william* r. *Barbara* p. 107 l. 14; for *Obligation* r. *Oblige* p. 108 l. Antepenult. for *whither* r. *where* p. 109 l. 16; in the margin for *Belieue* r. *Relieve* p. 116 l. 37; for *De Elegit* r. *Elegit* de p. 119 l. 25 for *Judgement* r. *Judges* p. 128 l. 25; for *Plea* r. *Replication* p. 129 l. 23; for *Officer* r. *Offence* p. 178 l. 31; after *Nec adde* *Bedicil* l. Antepenult; blot out *There must be added* for *forme* and *so made composition* p. 179 l. 33, 4, 5. blot out *Flood* and *Knights* case l. 24; for *Hollam* r. *Halman* p. 183 l. 14; for *A Sufficient* r. *An Efficiens* p. 141 l. 18; Between *Lichfield* and *was adde* *wherein* it was alleged that the said *Bishoprick* of *Creveny* and *Lichfield* p. 160 l. 17; for *Heyward* r. *Clare* p. 99 l. 39; after *Differed* adde *And held that Tenants cannot maintain in such a case for the mischief of diffension to the Lords and said it had been so resolved. But I had said in my sentence precedents are as the case is, and therefore are to be viewed and weighed* p. 202; after *Escaped* (last before *Sir Arthur Manwaring* case) adde *And I directed likewise that the new Sheriff was not answerable to this action because the second taking in execution was never Lawfull* p. 185 l. 39; for *Metropolitans* r. *Metropolitani* p. 187 l. 25; blot out the marginall note p. 199 l. 21; blot out *Not of substance* to the action and adde the same words so blot out to the word *Forme* in the l. following l. 23; after *Surplusage* make a ( ) p. 221 l. 10; for *Elizabeth* r. *H. 8.* l. 17; for *Eliz.* r. *H. 8.* p. 223 l. 47 for 28 Apr. 1 H 8. r. *which was* 28 Apr. 31 H 8. l. 48; for *Eliz.* r. *H. 8.* p. 235 l. 32; for *Lover* r. *Jury* p. 246 l. 8; for *And demurred judgement* r. *And the Plaintife demurred and judgement was given* p. 246 l. 25; for *pleaded* r. *moved* p. 250 l. 8; for *The other upon* r. *upon the other* l. 21 and 23 for *Intestate* r. *Testator* p. 263 l. 36; for *was* r. *and* p. 264 l. 22, and 24; for *Sidney* r. *Sidley* p. 266 l. 42; for *Guilty* r. *Not Guilty* p. 268 l. 9; for *Haring* r. *Harvy* p. 273; The title of the case must be *Richard Earle of Clamrickard and the Lady Frances his wife against Robert Sidney vicount Lisle* p. 273 l. 25, and 36; for *Demandant* r. *Demandants* l. 4; for *declares* r. *declare* for *And Francis* his r. *And the said Lady Frances* then his p. 276 l. 1; for *Reported* r. *expounded*; 10 adde in the margin 1 *Point* p. 277 l. 16; after *It adde* *Selfe* in the *see* simple granted to *Goswin and Scriven* l. 21; after *Reverfon* blot out the rest of that l. and the four lines following l. 33; after *Law* adde *If the Estate for life were extinct or involved in the estate given by the flux 7 last. it must be either by &c.* as follows in the four lines blot out l. 54; for *Intayle* r. *for life* l. 55; blot out or *last* p. 288 l. 20; for *of the Clergy* r. *of Clergy* l. 44; for *See* r. *See* p. 292 l. 1; for *Credulitate* r. *Credulitate* p. 297 l. 33; for *Prescriptions* r. *Presumptiōes* p. 299 l. 30; for *Att. r.* p. 313; for *Long vers.* *Hobart* r. in the title page and name of the case *Windsore vers. Hobart* p. 329 l. 33; for *Entered* r. *Mentioned* l. 42, 43; for *And so it severall had* r. *And so it severall, and accordingly it had* p. 321 l. 1; for (19) r. (13) l. 30 blot out of the beires p. 347 l. 26; for *Officer* r. *Office*